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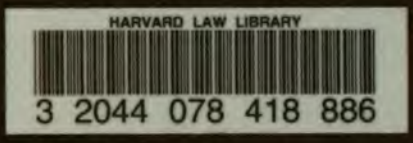
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VOL. 150

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IN THE

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OF MINNESOTA

JULY 15—DECEMBER 23, 1921

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REPORTER

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OF

THE SUPREME COURT

OF MINNESOTA

DURING THE TIME OF THESE REPORTS

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Pursuant to G. S. 1913, § 123, the headnote in each case is prepared by the justice or commissioner writing the opinion, except where otherwise noted.

With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of the court.

As required by G. S. 1913, § 137, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

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BY ORDERS MADE IN OPEN COURT, THE OPINIONS WRITTEN BY THE COMMISSIONERS AND REPORTED IN THIS VOLUME WERE ADOPTED AS THE OPINIONS OF THE COURT BEFORE THEY WERE FILED, AND HAVE THE SAME FORCE AND EFFECT AS THOUGH WRITTEN BY A JUSTICE OF THE COURT.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

PAULINE STANSBERRY AND PAULINE STANSBERRY AS MOTHER, ETC. v. MONITOR STOVE COMPANY.[1]

July 15, 1921.

No. 22,414.

Workmen's Compensation Act.

1. An Ohio corporation, whose northwestern business is localized at a Minneapolis branch, is, as to employes of that branch, within the Minnesota Compensation Act.

Injury to traveling salesman outside of Minnesota.

2. A traveling salesman, employed in connection with the business localized in this state, is within the Minnesota act, though injured by accident outside of the state.

Death caused by hotel fire.

3. Where a traveling salesman, obliged to stop at hotels in the course of his travel and to furnish his employer with a list of the cities on his itinerary, the names of the hotels at which he is to stop and the time he is to be at each hotel, is killed while attempting to escape during a fire in one of such hotels in which he is stopping, compensation may be recovered.

Upon the relation of the Monitor Stove Company the supreme court granted its writ of certiorari directed to the district court for Hennepin

[1]Reported in 183 N. W. 977.

county and the Honorable Charles S. Jelley, one of the judges thereof, to review the proceedings of that court in an action brought under the Workmen's Compensation Act, by Pauline Stansberry, widow of Frank J. Stansberry, employe, and others against relator, employer. Affirmed.

A. A. Tenner, for relator.

Ware & Melrin, for respondents.

HALLAM, J.

Frank J. Stansberry was a traveling salesman for defendant company. While in the Frederic Hotel at Grand Forks, North Dakota, a fire broke out at night and Stansberry was killed while attempting to escape. His widow and minor children made claim for compensation under the Minnesota Workmen's Compensation statute. The claim was allowed. Defendant appeals.

1. Defendant is an Ohio corporation. It manufactures and sells furnaces. It maintains a permanent branch office, warehouse and agency in Minneapolis, Minnesota. The sale and distribution of furnaces in the northwest, including Minnesota and North Dakota, are made through the Minneapolis agency. Stansberry was employed by the Minneapolis branch and worked under its direction. For purposes of this case the situation is the same as though the head office instead of a branch were located in Minnesota. The business in which Stansberry was employed had a situs in this state.

2. The territory in which Stansberry traveled was for the most part in North Dakota. The business in which he was engaged was localized in this state, and, in such a case, our compensation act applies and compensates for injuries in a service incident to its conduct, sustained beyond the borders of the state. State ex rel. Chambers v. District Court of Hennepin County, 139 Minn. 305, 166 N. W. 185, 3 A. R. L. 1347; (distinguishing Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620); State ex rel. Maryland Cas. Co. v. District Court of Rice County, 140 Minn. 427, 168 N. W. 177; State ex rel. McCarthy Bros. v. District Court of Hennepin County, 141 Minn. 61, 169 N. W. 274.

3. A more difficult question is whether the death of Stansberry was due to an accident arising out of and in the course of his employment as provided in G. S. 1913, § 8195. The death of Stansberry was accidental as that term is used in the act. The fact that death resulted

from an attempt to escape from the fire puts the case in no different position from what it would have been had he perished in the fire.

The court found that Stansberry lost his life "while in the act of furthering the interests and business of the defendant, and while engaged in saving certain property of the defendant, then and there in his possession and in attempting to save his life." The property referred to was a portfolio containing advertising matter, a sales order book, report sheet and advertising samples. We should not predicate liability on the fact of the efforts of Stansberry to save these small items of property.

The important facts are that he was a traveling salesman engaged in the service of his employer. As such he was obliged to stop at hotels in the course of his travel and to furnish the Minneapolis office with a list of the cities on his itinerary and the names of the hotels at which he was to stop and how long he was to be at each hotel, and it was his duty to carry out such schedule. He had given Grand Forks as one of such cities and the Frederic Hotel as his stopping place there. The question is whether such an injury received while stopping there arose out of and in the course of his employment. We think it did.

In State ex rel. Chambers v. District Court of Hennepin County, supra, it was held that a traveling representative injured by the overturning of an automobile used by him in the course of his travels was within the statute.

In State ex rel. McCarthy Bros. v. District Court of Hennepin County, 141 Minn. 61, 169 N. W. 274, it was held that a traveling representative, drowned while using a boat to catch a train during a flood, was within the statute.

In Foley v. Home Rubber Co. 39 N. J. Law J. 115, a salesman who lost his life on the sinking of the Lusitania was held within the act.

In Chitty v. Nelson, 2 B.W.C.C. 496, a servant in a hotel, occupying a room in a hotel in order to perform her duties as servant, who was suffocated in a fire that broke out in the night-time, was held within the act.

In re Bollman (Ind.) 126 N. E. 639, a threshing machine man, sleeping in a barn on a farm where the machine was operating, injured while asleep by the falling of a wagon-box, was held within the act.

In Marshall v. Wild Rose, 79 L. J. (1910) 912, a sailor left his berth in the night and went on deck, and next day was found missing. No recovery was allowed, but it was said that if it appeared that deceased was washed overboard, even at a time when he was sleeping, recovery would have been permitted.

In Blovelt v. Sawyer, 73 L.J.K.B.N.S. 155, a bricklayer, while eating dinner on the premises of his employer, injured by the collapse of a wall, was held within the act.

Our decision that the case is within the statute seems to us in harmony with the principle of our former decisions and with the weight of authority elsewhere.

Forman v. Industrial Acc. Comm. 31 Cal. App. 441, 160 Pac. 857, and Kass v. Hirschberg, Schutz & Co. 191 App. Div. 300, 181 N. Y. Supp. 35, relied on by counsel for relator, seem to us fairly distinguishable. In the California case the employe was selling real estate on commission, and, for an indefinite time, was located in the town and quartered at the hotel where he was injured. In the New York case it was held that the employer, engaged in the business of "wholesale dress trimmings," was not within the New York act. Anything further said in the opinion would seem to be obiter.

G. S. 1913, § 8230-i, provides that the act is declared "not to cover workmen except while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

Relator's counsel argue persuasively that the above language excludes this case. If the question were a new one, it would be worthy of grave consideration. But we think the language permits recovery in this case as clearly as in the Chambers or McCarthy cases.

Affirmed.

STATE EX REL. ETHEL ELIZABETH SPRATT v. CHARLES N. SPRATT.[1]

July 15, 1921.

No. 22,541.

Habeas corpus — stay.

1. A writ of habeas corpus initiates an independent proceeding which cannot be stayed or suspended by a stay of proceedings in another action, although the ultimate rights of the parties may depend on the result of such other action.

Judgment not vacated by taking an appeal.

2. An appeal with a supersedeas bond does not vacate or annul the judgment appealed from and the matters determined by it remain res judicata until it is reversed.

Upon the relation of Ethel Elizabeth Spratt the district court for Hennepin county granted its writ of habeas corpus directed to Charles N. Spratt. The matter was heard by Waite, J., who ordered that the minor children be delivered to relator. From the order restoring the children to relator, defendant appealed. Affirmed.

A. B. Jackson and *Ray H. Kenyon*, for appellant.

George T. Simpson, John F. Dahl and *Eugene S. Bibb*, for respondent.

TAYLOR, C.

The relator sued out a writ of habeas corpus from the district court of Hennepin county to recover the temporary custody of Margaret Spratt, Charles Webster Spratt and Cynthia Spratt, minor children of the relator and of the respondent who were then in the custody of the respondent. The court found that the allegations in the petition for the writ were true and ordered that the children be delivered to the relator, "to be held in temporary custody in accordance with the amended judgment and decree of this court duly entered on the 22nd day of June,

[1]Reported in 184 N. W. 31.

1921, in the action of Ethel Elizabeth Spratt against Charles N. Spratt." The respondent in the writ appealed from the above order and will hereafter be designated as the appellant.

The matter was submitted to this court on the record. From the return it appears that, in an action in the district court of Hennepin county brought by the relator against the appellant, a judgment of divorce in favor of the appellant was duly rendered and entered on December 15, 1917; that in and by this judgment the custody of the children above named was confided to the appellant, their father, with certain rights of visitation on the part of the relator, their mother; that after an extended hearing the district court, on June 22, 1921, amended its judgment by providing, among other things, that during the school vacation of the present summer and each school vacation hereafter, until the further order of the court, the relator shall be entitled to, and shall have, the custody and control of the children above named, the appellant to have the custody and control of them during the remainder of the year; that on June 23, 1921, appellant duly appealed to this court from such amended judgment and gave a supersedeas bond to stay proceedings thereunder, and that the writ of habeas corpus was served on appellant on June 23, 1921. While the writ of habeas corpus was apparently served before the appeal had been perfected by filing the supersedeas bond, an order from this court staying proceedings under the judgment was served on the morning of June 23, 1921, and before the service of the writ of habeas corpus, and we shall assume that appellant is correct in his contention that all proceedings under the judgment had been stayed before the habeas corpus proceeding was initiated.

The principal question argued at the hearing was whether this stay of proceedings operated to bar the habeas corpus proceeding. We think this question has already been answered by this court adversely to appellant in State v. McDonald, 123 Minn. 84, 142 N. W. 1051. In that case it was held, in effect, that a writ of habeas corpus is not a proceeding in any other action, but an independent proceeding in the nature of a new action brought by the relator to enforce rights then existing, and that proceedings under it cannot be suspended by a stay of proceedings in another action, although the ultimate rights of the parties may depend upon the result of such other action. The writ requires the court

to determine whether the person concerned is illegally held in custody or restrained of his liberty under the facts as they are found to exist at the time the question is presented, and this is a right of which such person cannot be deprived. Following the McDonald case and the cases cited therein, we hold that the relator had the right to prosecute this proceeding notwithstanding the fact that proceedings under the judgment had been stayed.

It is also contended that the appeal with a supersedeas bond operated to annul the judgment appealed from, and to leave the judgment of December 15, 1917, still in force unmodified.

We are unable to sustain this contention. An appeal with a supersedeas bond does not vacate or annul the judgment appealed from, and the matters determined by it remain res judicata until it is reversed. 2 R. C. L. 117, § 94, and cases there cited; 3 C. J. 1316, 1317, and numerous cases cited in notes 37 and 38; Woolfolk v. Bruns, 45 Minn. 96, 47 N. W. 460; Allen v. Robinson, 17 Minn. 90 (113); Robertson v. Davidson, 14 Minn. 422 (554). See also Briggs v. Shea, 48 Minn. 218, 50 N. W. 1037.

The judgment of June 22, 1921, still remains in force and determines the rights of the parties so far as the proceeding under this writ of habeas corpus is concerned. Possibly a court might interfere under such a writ if events occurring subsequent to the judgment showed that the welfare of the children required that a different disposition be made of them, but that question is neither presented nor decided here.

We find no other questions requiring special mention. Upon the facts as they appear in the return, the learned district court reached the correct conclusion, and the order appealed from is affirmed.

CARL WILHELM OLSEN v. DANISH BROTHERHOOD IN AMERICA AND OTHERS.[1]

July 22, 1921.

No. 22,221.

Mutual benefit association — change of rates an internal affair.

1. Changing rates of assessments and benefits in a fraternal beneficiary association pertains to the management of its internal affairs.

Foreign corporation — regulation of internal affairs — complaint demurrable.

2. Courts refuse to entertain actions which interfere with or attempt to regulate the management of the internal affairs of a foreign corporation. Hence the complaint herein, which shows that the action is brought by plaintiff in his own behalf and in behalf of the other members of the defendant corporation, a fraternal beneficiary association incorporated under the laws of Nebraska, to enjoin said defendant and its officers from enforcing changes made in the assessment rates and benefits of the association, was demurrable.

Action in the district court for St. Louis county to restrain defendants from making certain amendments in the constitution and by-laws of the Danish Brotherhood in America. An application for a temporary injunction was denied. Defendants' demurrers to the amended complaint were overruled, Dancer, J. From the order overruling the demurrers, defendants appealed. Reversed.

Greene & Forbes, for appellants.

James A. Wharton, for respondent.

HOLT, J.

Appeal from an order overruling a demurrer to an amended complaint, the questions involved being certified as doubtful.

It will not be necessary to set out the lengthy pleading, in view of the ground upon which we dispose of the appeal. The substance of the

[1]Reported in 184 N. W. 178.

allegations only need be mentioned and are these: That the defendant corporation is a fraternal beneficiary association organized and existing under the laws of Nebraska, the other defendants being the officers of a subordinate lodge of the association at Duluth; that plaintiff is a member in good standing and holds a membership benefit certificate issued by the association; that the association has been authorized to do business in this state; that at a convention of the association it undertook to change its by-laws, radically altering the membership assessments and the benefits, and that these changes were not made in accordance with the constitution or by-laws of the association and were not made so as to comply with a certain Nebraska statute pleaded. Plaintiff alleges that he brings the action "in his own behalf and in behalf of other members of said order;" that defendants are about to promulgate and enforce said changes and amendment and thereby irrevocably destroy the vested rights and equities of plaintiff, and other members of said order; "that said amendment and change in their contract of insurance will impose increased rates, liens, charges, and in some cases of loss of death benefit; will impair the value of certificates and deplete the present surplus funds; will create lapses with extended insurance privilege never intended in original certificate, and that said act is wrongful, unauthorized, illegal and unreasonable and constitutes a breach of contract with plaintiff and other members and each of them" in nine specified respects pertaining to each member of the order. The prayer is that the said amendment and changes in the rates and plan of assessments be declared null and void and that said defendants and each of them and their successors and agents be forever restrained "from carrying them into effect."

The demurrer was on two grounds: (1) That the court has no jurisdiction of the subject of the action in that it appears that the acts complained of affect plaintiff solely as a member of the defendant corporation and that the action relates altogether to the management of the internal affairs of a Nebraska corporation, and (2) the facts stated do not constitute a cause of action.

It is to be noted that the action is not confined to plaintiff's own contract and its preservation. It is brought in behalf of other members of the corporation also, and to prohibit defendants from enforcing the

adopted changes of rates and benefits. Such action in behalf of others is authorized under the proviso of section 7674, G. S. 1913. But it is quite apparent that fixing rates and benefits, of a corporation of this kind, pertains to the management of its internal affairs. Benefits promised must come from rates paid or assessments levied against the members. The very existence of the corporation depends upon a proper adjustment of rates and benefits. How this is to be done is peculiarly a problem of internal management, to be solved by the governing body of the corporation or by delegates of its members in convention assembled. The necessary changes to maintain a proper ratio between receipts and disbursements must be worked out within the organization under the supervision of its officers and in the manner prescribed by its laws and the laws of the state of its domicile. It is apparent that, if an action of the nature here pleaded may be maintained in every state where the corporation has members, uniformity of either assessments or benefits could not be hoped for. The courts of one state might hold changes made by the corporation valid, while courts of other states declare them void. No association of the sort here involved, having members in different states, could well survive a condition where the courts of a state other than its domicile step in and determine for the future what the assessments and benefits of its members in such state shall be. The disaster likely to result to foreign fraternal beneficiary associations, if actions of the instant type lie, may well cause courts to pause before assuming jurisdiction. Especially so in view of the decision in Supreme Council of Royal Arcanum v. Green, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. ed. 1089, L.R.A. 1916A, 771, where it was held that an adjudication as to rates and benefits by the courts of the domicile of the corporation binds its members wherever residing. Some courts also give, as a reason for declining to assume jurisdiction over affairs relating to the internal management of a foreign corporation, that neither its officers or governing body nor its records, are within the reach of the decrees, orders or processes of any courts except the courts of its domicile.

This court has repeatedly recognized the rule that equity will not take jurisdiction of actions wherein it is sought to interfere with the internal management of a foreign corporation's business. Guilford v. Western Union Tel. Co. 59 Minn. 332, 61 N. W. 324, 50 Am. St. 407; Selover v.

Isle Harbor Land Co. 91 Minn. 451, 98 N. W. 344; State v. DeGroat, 109 Minn. 168, 123 N. W. 417, 134 Am. St. 764; Gere v. Dorr, 114 Minn. 240, 130 N. W. 1022; Van Dyke v. Railway Mail Asen. 118 Minn. 390, 137 N. W. 15, Ann. Cas. 1913E, 455; Tasler v. Peerless Tire Co. 144 Minn. 150, 174 N. W. 731.

Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266, 66 N. E. 932, is greatly relied on by respondent. It was there held, three justices dissenting, that an action for damages does not lie against a foreign fraternal benefit association for unlawfully increasing assessments, but the remedy is in equity to compel the association to live up to its contract with its member. However, it was not intimated that an action in behalf of other members would lie. Our attention has not been called to any other case of a similar ruling, and we have found none outside the state of New York. It is directly opposed to the decision in Ebert v. Mutual R. F. L. Assn. 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457, where this equitable remedy was unsuccessfully urged upon the court. The experience of the New York courts seems to cast doubt on the practical workings of the rule there adopted, for after Green v. Supreme Council of Royal Arcanum, 206 N. Y. 591, 100 N. E. 411, was, in 237 U. S. 531, 35 Sup. Ct. 724, 59 L. ed. 1089, L.R.A. 1916A, 771, reversed by the Supreme Court of the United States (wherein the appellate court of New York had applied the rule of the Langan case, notwithstanding that the courts of the domicile of the corporation had held the change in the assessments valid), the case of Evans v. Supreme Council of Royal Arcanum, 223 N. Y. 497, 120 N. E. 93, 1 A. L. R. 163, was determined. There the plaintiff, Evans, relying on the Green decision in 206 N. Y. 591, 100 N. E. 411, tendered the assessments according to the rate before the change, and when the amount was refused brought the action to enjoin the society from suspending him. He obtained a temporary injunction upon the giving of a bond to pay whatever rate the court would finally adjudge to be the lawful rate. The appellate court, under the decision of the Federal court in the Green case, felt itself compelled to hold the change in the rate binding as determined by the courts of the domicile of the defendant, and that therefore Evans, because of the nonpayment of the assessments as changed, was deprived

of membership notwithstanding the courts of New York had attempted to maintain his status by means of the injunction.

In our opinion the amended complaint shows on its face that the action is one in which a court of this state is asked to interfere with the internal management of a foreign corporation. Jurisdiction should not be assumed for that purpose, and the demurrer should be sustained.

The order is reversed.

NORTHERN WELDING COMPANY AND VULCAN PROCESS COMPANY v. L. E. JORDAN, H. A. HALLUM, J. C. HALLUM, AND C. H. BURROWS.[1]

July 22, 1921.

Nos. 22,222, 22,223.

Contract — unequivocal language will not be construed by the court.

1. A contract, which in plain terms obligates one party to save another harmless from any and all claims, is not limited by an especial reference to particular claims. Where language is unequivocal, rules of construction have no application.

Indemnity contract — when subsequent breaches may be included.

2. A contract to indemnify against claims on account of contracts, not intended to indemnify against subsequent breaches generally, may apply to subsequent breaches arising out of acts of an agent under a contract previously made authorizing him to perform such acts.

When a party should violate his contract — test rule.

3. Whether it was the duty of the party indemnified to violate the contracts with its agents, in order to mitigate damages, is to be determined by the test whether a reasonably prudent and diligent person would take such a course.

When indemnitor is liable for expense of making defense to claim.

4. Where an indemnitor is under obligation to defend against a claim and defense is tendered and refused, the indemnitor is liable for the reasonable expense of the defense.

[1]Reported in 184 N. W. 39.

Action in the district court for Hennepin county to recover $7,068.01 and for an accounting. Defendants' demurrers to the complaint on the ground that several causes of action were improperly united and that the complaint did not state facts sufficient to constitute a cause of action, were overruled. The case was tried before Hale, J., who made findings and ordered judgment in favor of plaintiffs. From the order denying their motions for a new trial, defendants appealed. Affirmed.

George S. Grimes, for appellants.

Kingman, Cross, Morley & Cant and *McDowell & Fosseen,* for respondents.

HALLAM, J.

On April 9, 1913, E. B. Teeple was doing business at Minneapolis under the name of Vulcan Process Company, and on that day sold to the Lewistown Iron Works of Lewistown, Fergus county, Montana, a Vulcan welding apparatus and equipment and by the contract of sale, agreed "to protect the Lewistown Iron Works for the county of Fergus, Montana, on our apparatus that we shall sell him, and guarantee not to place any other apparatus in said county without their consent." In June, 1913, defendant Jordan acquired a partnership interest in the business of the Vulcan Company. In July, 1913, the Vulcan Process Company was incorporated and took over all the property and assumed all debts, liabilities and obligations of Teeple and of the partnership. Teeple and defendant Jordan were directors and officers and actively engaged in the management of the corporation.

In February, 1914, the corporation, through its jobbers, sold a Vulcan welding apparatus and equipment to Herbert McHardie, a blacksmith in Fergus county, Montana. In April, 1915, the Lewistown Company sued the corporation for damages for breach of its contract because of the sale to McHardie. In January, 1916, it recovered a verdict for $4,200.

In 1915 Teeple retired and Jordan became the active manager of the corporation. In January, 1916, defendants H. A. and J. C. Hallum and Burrows purchased stock in the corporation and in March, 1916, defendants were the owners of practically all the stock of the corporation. In March, 1916, defendants sold their stock to the Northern Welding Company. This company had for some time been manufacturing the prod-

uct, the Vulcan Company selling it. A contract was entered into between the Northern Welding Company, party of the first part, the Vulcan Process Company, party of the second part, and defendants, parties of the third part. The contract contained this stipulation:

"Third parties hereby agree also that in further consideration of the covenants herein contained, they will at all times assume full liability for and save first and second parties harmless from any and all claims or damage suits on account of any contracts or agreements made by or for second party, or by any of its agents, officers or employes, for second party, prior to the date hereof (especial reference being had to a disputed account for twenty-one hundred and sixty dollars ($2160.00) with the Prest-O-Lite Company of Indianapolis, Indiana, a verdict for forty-two hundred dollars ($4200.00) secured by Lewistown Iron Works of Lewistown, Montana, against second party, and certain claims made by the Canadian Government for certain duties in reference to goods sold to the Auto-Lite Gas Company of Winnipeg, by second party."

In June, 1916, the verdict of $4,200 in favor of the Lewistown Iron Works was set aside and a new trial granted. In July, 1916, the Lewistown Iron Works brought a second action against the Vulcan Company for seven other breaches of the same contract, arising out of sales of apparatus to seven other concerns in Fergus county, on dates as follows: June 1, 1915; June 5, 1915; August 1, 1915; Jan. 15, 1916; May 15, 1916; June 15, 1916; June 20, 1916.

This action was consolidated with the first one and a verdict recovered for $4,600. Judgment was entered and the judgment paid.

In March, 1917, the Lewistown Iron Works commenced a third action against the Vulcan Process Company for five violations of the contract of April, 1913, resulting from sales on the following dates: October 7, 1916; November, 1916; December 1, 1916; December 5, 1916; January 30, 1917. Judgment was given for plaintiff for $1,885.82 and this was paid.

The trial court held defendants liable under their agreement of March 8, 1916, for the amount of both judgments and for attorney's fees and disbursements in the last mentioned action. All defendants appeal, defendant Jordan appealing separately.

1. Defendants contend that the contract of defendants obligated

them to pay only the claims enumerated in the contract. We do not so construe the contract. The contract is plain in its terms and obligates defendants to save the other parties harmless from any and all claims or damage suits on account of contracts or agreements theretofore made. The "especial reference" to three claims was unnecessary, but it did not limit the clear and unequivocal language that preceded it. Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956; Murphy v. City of New York, 190 N. Y. 413, 83 N. E. 39; Dunbar v. Dunbar, 71 Mass. (5 Gray) 103. The language is so clear and unequivocal that rules of construction, such as the rule of ejusdem generis, resorted to as an aid in case of doubt, have no application. See National Bank of Commerce v. Ripley, 161 Mo. 126, 132, 61 S. W. 587; English v. Shelby, 116 Ark. 212, 172 S. W. 817; In re Orwig's Estate, 185 Iowa, 913, 167 N. W. 654. The result is that the fact that the $4,200 verdict was set aside is unimportant.

2. Three of the claims for damages in the consolidated action arose out of breaches of contract occurring after the agreement of March 8, 1916. This contract was not intended as an indemnity against subsequent breaches generally. But these subsequent breaches arose by reason of sales made by agents under contract and authority which had been given them previous to March 8, 1916. Under such circumstances, we think they were covered by defendant's contract. This also applies to the claims upon which the judgment in the third action was obtained, except that the last sale was made by an agent previously authorized, but after the expiration of his agency contract. This fact was not called to the attention of the trial court, and defendants should not now be permitted to raise the point. Had it been seasonably raised, a proper adjustment of damages might have been made.

3. Defendants contend that the damages would have been less had the corporation violated its contract with its agents by refusing to fill orders made by the agents in Fergus county, and that the corporation should have taken this course in order to minimize the damages. We do not think the court should hold as a matter of law that the corporation was obliged to take this course. The court found that the manager of the corporation, during the period of these later sales, had no knowledge of the Teeple contract, or its assumption by the corporation, or of the pend-

ing litigation in respect thereto, and that defendants never advised him that sales were not to be made in Fergus county. The fact of assumption by the corporation was disputed, and it was wholly uncertain what damage, if any, would ensue from sales in Fergus county.

It was the duty of the corporation to use prudent and reasonable care and diligence to minimize its damages. No particular course can be mapped out as the proper one, unless it can be shown that such course would be the only one which a reasonably prudent and diligent person would pursue. Cargill v. Thompson, 57 Minn. 534, 547, 59 N. W. 638; Chicago, R. I. & P. Ry. Co. v. Floyd (Ark.) 171 S.W. 913; Southern Ry. Co. v. Cunningham, 123 Ga. 90, 50 S. E. 979; 1 Sutherland, Damages, § 90. We cannot say as a matter of law that a reasonably prudent and diligent person would pursue the course contended for by defendants.

4. We think plaintiffs were entitled to recover the attorney's fees incurred in the last Lewistown Iron Works lawsuit. Defendants were tendered the defense of this suit. They were under obligation to defend it, and they should be held liable for this reasonable expense of the defense.

Order affirmed.

STATE EX REL. P. A. HILBERT AND OTHERS AS THE STATE BOARD OF CONTROL v. PROBATE COURT OF MAHNOMEN COUNTY.[1]

July 22, 1921.

No. 22,322.

Dependent and neglected child — when juvenile court may end guardianship of board.

Chapter 397, Laws 1917, is construed to give the juvenile court, committing a dependent or neglected child to the guardianship of the state board of control, the power to terminate such guardianship, at any time before the child is legally adopted, when the parent proves to the sat-

[1]Reported in 184 N. W. 27.

isfaction of the court that he or she is able and willing to properly support, care for and educate the child.

Upon the relation of P. A. Hilbert and others the district court for Mahnomen county granted its writ of certiorari directed to the probate court for that county, to review the action of that court, Reck, J., in awarding the custody of minor children to their mother and terminating the guardianship of the state board of control. From an order, Grindeland, J., discharging the writ, the state appealed. Affirmed.

Clifford L. Hilton, Attorney General, and *Egbert S. Oakley*, Deputy Attorney General, for appellant.

Johnston & Carman, for Mrs. Davidson, formerly Mrs. Dodge.

HOLT, J.

Pursuant to chapter 397, p. 561, Laws 1917, George and Catherine Dodge, dependent children 12 and 13 years old, respectively, were placed under the guardianship of the state board of control by the probate court of Mahnomen county, sitting as the juvenile court of that county. More than a year thereafter, the mother of the children petitioned that court to set aside the decree, on the ground that notice of hearing had not been served upon her so as to afford her an opportunity to be present thereat, and that her circumstances had so altered that she could now properly support and care for the children. The court ordered the children discharged from the guardianship of the board of control. The latter sought a review of the order on certiorari from the district court. The writ was discharged and relator appeals.

We shall not consider whether, upon the service made, the juvenile court had jurisdiction to deprive the mother of her children forever, for we have reached the conclusion that the appeal may be disposed of by an answer to this question: May the state board of control's guardianship of dependent and neglected children be terminated by the juvenile court during their minority, there being no claim of improper treatment while under the board's control?

Appellant contends that Armstrong v. Board of Control of State Public School, 88 Minn. 382, 93 N. W. 3, is decisive of the question. There, in construing the effect of a guardianship of children, commit-

ted to the state school at Owatonna under chapter 210, p. 386, Laws 1897, it was said: "Whether one committed to the care and custody of the school should be released prior to arriving at its majority is a matter resting in the sound discretion of the school board,—a department of the executive branch of the government,—with the exercise of which the courts have no jurisdiction to interfere or intermeddle in any way." No other conclusion could have been reached under that statute which provided that when the court entered the order committing the child to the school the parents "shall thereafter have no rights over or to the * * * earnings of said child, except in such cases as said board may, as herein provided, restore the child to its parents." (Section 6). The board of that school was made the legal guardian of all children committed to the school, "which guardianship shall be continued during the minority of such children, except in the cases in which, under this act, the guardianship may be canceled by resolution adopted by said board." (Section 8). Exclusive right was given the board in all cases to release the child before majority, except where there had been a legal adoption which worked a release. (Section 12). "Whenever any ward of said school, who is not indentured as herein provided, has become self-supporting, the said board may, at its discretion, so declare the fact by resolution, and thereupon said guardianship shall cease, and the child shall thereafter be entitled to its own earnings. Whenever one or both of the parents of any ward of said board, who is not indentured, have become able to support the child and educate it, the child may, by resolution adopted by said board, be restored to its parents." (Section 10).

But, we think, a different policy was adopted with the advent of the juvenile courts. In chapter 285, p. 418, Laws 1905, such courts, in counties of over 50,000 inhabitants, were given exclusive jurisdiction of dependent, neglected and delinquent children. The state board of control had only supervisory duties over the institutions which the court might appoint to guardianship of such children. (Section 11). That the court committing the child still retained jurisdiction to change or terminate the guardianship, is evident from the fact that, if an adoption proceeding was begun in another court than the court which appointed the guardian, 30 days' notice must be given the latter court (section 8); no power of discharge was vested in the board of control; the board of

any institution appointed guardian might parole and recommend a discharge, but the court must act thereon (section 9); and the court might at any time proceed to inquire into the ability of the parents to support the child and "enter such order or decree as shall be according to equity in the premises." (Section 10).

A similar act, chapter 232, p. 269, Laws 1909, gave jurisdiction to probate courts, in counties of less than 50,000 inhabitants, over dependent, neglected and delinquent children. By section 8 thereof any parent of a child put under guardianship may, after the expiration of one year of such guardianship, apply to the probate court which created the same to terminate it:" "And if it appears by clear and convincing evidence that the causes which produced or contributed to the dependency, neglect, or delinquency of such child no longer exist, the child, unless previously adopted, shall be restored to its parents." The authority of the state board of control was retained as visitorial merely over guardians appointed. (Section 10). No change in these respects was made by the amendments of the act as found in chapter 260, p. 356, Laws 1913.

The laws relating to juvenile courts and their jurisdiction over dependent, neglected and delinquent children were codified into chapter 397, p. 561, Laws 1917, embracing in one act both probate and district courts sitting as juvenile courts. This last act manifests no intention to make any substantial change in the then existing law. Insofar as this act gives the court authority to appoint the board of control a guardian, the board occupies the same position as any institution or individual appointed. We fail to find any intimation that to it, or to any guardian, is reserved the right to determine when the guardianship shall end, except as it may be done by consenting to an adoption. By express terms the court retains authority to discharge a delinquent child placed under guardianship. (Section 13). And a delinquent child may be committed by the court to "an association that will receive it, embracing in its objects the care of dependent or neglected children." (Section 13). If such child be committed to the state training school, it may not be discharged within one year after the commitment without the approval of the court. (Section 13). It therefore seems that the court loses control to no appointed guardian. And we think the whole scheme of the legislation with reference to dependent, neglected and delinquent children is to

commit them to the jurisdiction of the juvenile courts until they are legally adopted, and that the authority and power of such courts over their wards are always supreme to that of the guardian to whose custody they have been committed by those courts. That such supreme authority is so vested is indicated by the fact that an adoption may not be had, even with the consent of the guardian, unless made by the court appointing the guardian, or upon 30 days' notice to that court of the hearing, if the adoption proceeding is in any other court.

The relator also calls to its aid chapter 194, p. 279, Laws 1917, approved 10 days prior to the approval of chapter 397. This law imposes additional duties upon the board of control in looking after the welfare of defective, illegitimate, dependent, neglected and delinquent children. True, section 1 thereof provides: "The state board of control shall have powers of legal guardianship over the persons of all children who may be committed by courts of competent jurisdiction to the care of the board, or to institutions under its management. After commitment to its guardianship the board may make such provision for and disposition of such child as necessity and the best interests of the child may from time to time require," with the exceptions that no child placed under the guardianship for delinquency may be adopted, nor may a child be put in an institution for delinquents without having been first adjudged delinquent by the court. That this act was not intended to place the board of control above the juvenile courts is indicated by section 3, making it the duty of the board to co-operate with such courts to promote the enforcement of all laws for the welfare of the children referred to in the act. This act contains no provision that carries a suggestion of an intention to shift the power conferred by said chapter 397 upon juvenile courts from such courts to the guardian appointed by them.

Laws which permit the severance of the tie that binds a parent to a child recognize the sacredness of that tie and extend the hope of reunion. Delinquent children, though committed to guardianship, cannot be permanently separated from their parents without the latters' consent. We cannot think parents of dependent or neglected children ought to occupy a worse position, so long as the child has not by legal adoption acquired other parents. Chapter 210, p. 386, Laws 1897, as already

noted, expressly conferred on the board of control of the state school the authority to restore such a child. And it is to be presumed that such authority exists either in the courts or the guardian under chapter 397, p. 561, Laws 1917. We think it is vested in the courts. In the case of a dependent child, section 11 provides that he shall not be taken from his parents without their consent, that is, committed by the court, unless, after diligent effort to avoid separation, the same shall be found needful in order to prevent serious detriment to the child. That the law aims at giving the child what the natural parents are most likely to render to the best advantage is plain from this provision: "That whenever it is necessary to provide for him (the child) elsewhere than with his parents his care, custody, and discipline shall approximate as nearly as may be that which ought to be given by his parents; and that in all cases where it can be properly done he shall be placed in an approved family home and become a member by legal adoption or otherwise." (Section 32). We gather from this that, until a child committed by a juvenile court has acquired other parents by legal adoption, the policy of the law is to hold out the hope to the natural parents that they may again have the child, upon proving to the court that conditions have so changed that they can and will properly rear and care for the child. That the court which placed the child under guardianship is the proper authority to determine when it should cease, would seem the most natural inference, unless there be some provision to the contrary in the law itself. We find none in chapter 397. On the contrary, there are indications that the committing court retains continued supervision over the child and its property superior to that of the guardian. If such child has property, and any more than the income is necessary for his education, the court, and not the guardian, determines whether any part of the principal may be used for the purpose. (Section 25).

As the law now stands the jurisdiction of juvenile courts over dependent, neglected and delinquent children, and the relation of such courts to the guardians to whose custody such children are committed, are so similar to the jurisdiction conferred upon and exercised by the probate courts in appointing, controlling and changing or removing guardians of minors and insane persons, that we may say that the same rules and

principles should govern. It is settled that a guardian appointed by the probate court is an officer of the court—the agent through whom the court extends the care and protection the ward needs. The guardian's conduct may always be regulated and controlled by the court appointing him. Cox v. Manvel, 56 Minn. 358, 57 N. W. 1062. Such being the case, it would seem to follow that the court has also the power to remove or free the ward from the guardian.

This construction of the juvenile court statute appeals to us not only as the one intended by the legislature, but as the one most likely to achieve the beneficent purpose sought. The court that originally takes jurisdiction of a dependent, neglected or delinquent child hears and determines his status on evidence. If any change develops after the adjudication which ought to restore the child to his parents, the court hears and determines that with knowledge of what the former trial showed. The state board of control, with its varied and multitudinous duties, is not in position to give the time necessary to personally hear and determine on the merits applications for restoration of parental rights, but would likely have to rely on the judgment of agents and subordinates. This would not be a desirable expedient in a matter of such importance both to the child and the parents. We conclude that the court, and not the board of control, has the final word on the question of restoration of a dependent or neglected child to the parents. Of course the law contemplates that a legal adoption takes the child out of the control of the juvenile court.

We add that there is no intimation in the record that relator has been remiss in its duties in any respect to the children in question. Nor did relator attempt to controvert the mother's claim that she is now fit, able and willing to properly support, care for and educate her children.

Order affirmed.

MARY E. WELSH v. WALTER A. WELSH.[1]

July 22, 1921.

No. 22,325.

Ante-nuptial contract set aside.

Ante-nuptial contracts are sustained when they are free from fraud, violative of no statute, are equitably and fairly made, and are fair and reasonable in their terms. The entire absence of provision for the wife imposes upon the husband the burden of showing that there was no fraud or concealment and that the prospective wife knew the extent, character and value of the prospective husband's property and the nature and extent of her rights as wife and widow. By ante-nuptial contract involved in this case, the prospective wife, a woman without means, surrendered all marital property rights and received nothing in return. The evidence on the part of the husband did not rebut the presumption arising, and the decision of the trial court setting aside such contract is sustained.

Action in the district court for Redwood county to set aside an ante-nuptial contract. The case was tried before Olsen, J., who made findings and ordered that the contract be set aside. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Alexander Seifert and *Erickson & Loomis,* for appellant.

Albert H. Enersen, for respondent.

HALLAM, J.

Plaintiff brought this action against her husband to set aside an ante-nuptial contract. The trial court decided in her favor and defendant appeals.

Prior to April, 1916, plaintiff lived in Rhode Island. She was about 43 years of age, and had been married, was living apart from her husband, and secured a divorce soon thereafter. She had two children, a

[1]Reported in 184 N. W. 88.

son about 14 and a daughter about 20. Defendant was a man about 50, unmarried, and living on a farm with his mother who was old and needed care. He advertised in a matrimonial paper for a housekeeper. Plaintiff answered. Correspondence followed, in which there was a suggestion of marriage if upon further acquaintance the same should be found agreeable. As a result of the correspondence, plaintiff, accompanied by her son, came to Minnesota in April, 1916, to act as housekeeper for defendant and his mother, and she acted in that capacity until March 15, 1917. Shortly after plaintiff came to Minnesota, the question of marriage was talked over between them, and it was agreed that they should marry at some future time. In June, 1916, defendant procured a marriage license, but no marriage was then performed. About March 14, 1917, plaintiff received a telegram, informing her that her daughter was seriously ill in Rhode Island and asking plaintiff to come to her. Plaintiff applied to defendant for an advance of money. Defendant refused to advance the money, unless they were first married and they went to Springfield and were married, and thereupon defendant advanced plaintiff $26 for expenses of her trip. Before the marriage they went to an attorney and defendant procured the attorney to prepare an ante-nuptial contract which was there signed. The contract was read to plaintiff and she understood its contents. No misrepresentations were made to her and she had a general knowledge of the amount of defendant's property. She signed the contract voluntarily and under no compulsion or excitement except the mental anxiety over her daughter. Defendant owned property which was then worth about $10,000 and has since increased in value.

By the terms of the ante-nuptial agreement, plaintiff renounced all interest in the property which defendant possessed or might thereafter possess, released all dower interest in any lands of defendant and all rights which the law otherwise would give her, including right of inheritance, personal property selection, and all provision for her maintenance which she might be entitled to under the law after defendant's death. Plaintiff had no property and has none at this time. The contract in terms provided that the marriage was the sole consideration for the agreement.

On these facts the court found that the contract was inequitable and unjust to plaintiff, that it lacked mutuality and consideration of any kind except the engagement to marry, that, because of such lack of equity and consideration, a court of equity should refuse to enforce it and adjudged that the contract be canceled and annulled.

This court has been liberal in sustaining ante-nuptial contracts. The substance of the decisions has been that such contracts are to be sustained if they are free from fraud, violative of no statute, are equitably and fairly made and are fair and reasonable in their terms. Desnoyer v. Jordan, 27 Minn. 295, 7 N. W. 140; Hosford v. Rowe, 41 Minn. 245, 42 N. W. 1018; Appleby v. Appleby, 100 Minn. 408, 111 N. W. 305, 10 L.R.A.(N.S.) 590, 117 Am. St. 709, 10 Ann. Cas. 563; Slingerland v. Slingerland, 115 Minn. 270, 132 N. W. 326; Malchow v. Malchow, 143 Minn. 53, 172 N. W. 915. See also Pavlicek v. Roessler, 222 Ill. 83, 78 N. E. 11; Deller v. Deller, 141 Wis. 255, 124 N. W. 278, 25 L.R.A. (N.S.) 751; Kennedy v. Kennedy, 150 Ind. 636, 50 N. E. 756.

In some of these cases cited, it was said that marriage alone is a sufficient consideration to support such a contract. In all of them, some substantial provision was made for the complaining spouse. In some, the complaining spouse had independent means.

In view of the fact that defendant had no children or dependents other than his aged mother, and that plaintiff had no property and was giving up her life to defendant, the contract was not fair or reasonable. Some decisions have held this alone sufficient to avoid such a contract. Mowser v. Mowser, 87 Mo. 437. And see the decisions of this court, above cited. But there is something more to this case. The entire absence of provision for plaintiff has been held in the cases cited and in cases from other jurisdictions, Fisher v. Koontz, 110 Iowa, 498, 80 N. W. 551; Tilton v. Tilton, 130 Ky. 281, 113 S. W. 134, 132 Am. St. 359; 21 Cyc 1250, to impose upon the husband the burden of showing, if he would sustain the contract, that there was no fraud or concealment, and that the prospective wife knew the extent, character and value of the prospective husband's property and the nature and extent of her rights as his wife and widow. Slingerland v. Slingerland, supra. The evidence is not before us. We have only the judgment of the court.

The judgment embodies the findings and these negative fraud in the nature of misrepresentations, but nothing more. It is found that plaintiff had a general knowledge as to the amount of property possessed by defendant. This is not usually regarded as sufficiently specific to sustain such an unequal agreement. See Slingerland v. Slingerland, supra; Warner v. Warner, 235 Ill. 448, 465, 85 N. E. 630. Also there is an entire absence of finding that plaintiff was at all advised as to the nature and extent of her rights as his wife and widow. When we take all these facts in conjunction with the pressure of anxiety of plaintiff over the illness of her daughter and her desire to secure funds necessary to enable her to go to her daughter, really the impelling cause of the execution of both ante-nuptial and marriage contracts at that time, it seems to us clear that defendant has not made the proof necessary to sustain a surrender of all marital property rights, and that the judgment of the trial court should be sustained.

BROWN, J. (concurring).

I concur in the result on the ground that the facts found by the trial court justify the conclusion of unfair and coercive conduct on the part of defendant in procuring plaintiff to sign the agreement amounting to duress of a character to void the transaction. I do not concur in the view that such contracts may be set aside on the naked ground that they are unfair and inequitable.

WYMAN, PARTRIDGE & COMPANY v. PETER BIBLE, SR.[1]

July 22, 1921.

No. 22,411.

Guaranty — notice of acceptance to guarantor.

1. An agreement to accept an offer of guaranty is necessary to complete a valid contract, but the agreement to accept may precede the execution of the guaranty by the guarantor, and, when it does, no further notice to the guarantor of acceptance by the guarantee is necessary.

[1]Reported in 184 N. W. 45.

Guaranty "against loss."

2. A guaranty "against loss" is a guaranty of collection, and, before resort can be had to the guarantor on such a guaranty, the creditor must exhaust his remedy against the principal.

Question for jury.

3. Whether the guaranty involved in this case covered purchases of goods made 19 months after the guaranty was given, was, under the circumstances of the case, a question for the jury.

Action in the district court for Benton county to recover $87.78 balance due for goods sold and delivered. Defendant's motion to dismiss the action was denied. The case was tried before Roeser, J., who at the close of the testimony denied motions for directed verdicts, and a jury which returned a verdict in favor of defendant. Plaintiff's motion for judgment notwithstanding the verdict, was denied. From the judgment entered pursuant to the verdict, plaintiff appealed. Affirmed.

Dodge & Webber and *K. L. Hjort,* for appellant.

Morgan J. Flaherty, for respondent.

HALLAM, J.

Plaintiff is a wholesale dealer in dry goods. In the summer of 1916, Peter Bible, Jr., was planning to open a store at Foley and ordered goods to the amount of $4,360, to be shipped October 1. On July 26 plaintiff wrote Peter, Jr., stating "we understood that your father was to be a partner with you, but we see that your goods were purchased in your name," and asking that his father "acknowledge the fact that he is a partner * * * or else favor us with a guaranty for which purpose we are inclosing one of our guaranty forms." Peter, Jr. took the guaranty to defendant, his father, told him plaintiff wanted the guaranty before shipping the goods; defendant signed the guaranty by mark and Peter, Jr. mailed it to plaintiff and plaintiff shipped the goods.

The guaranty was in form as follows: "For value received I hereby guarantee to save you from loss on account of merchandise sold, or to be sold, by you to Peter Bible, Jr., of Foley, Minnesota."

This order of goods was later paid for in full. Peter, Jr. bought goods

on account from time to time, in all about $7,600 worth, up to August, 1917, when the account was settled by his giving a note which was paid. After that Peter, Jr. was not accorded credit, but made some small purchases for cash until February, 1918, when he purchased on credit a bill of goods amounting to $212.38. On this purchase there is an unpaid balance of $87.78, to recover which this action was brought. The jury found for defendant. Plaintiff moved for judgment notwithstanding the verdict, but not for a new trial. The motion was denied and from the judgment entered plaintiff appeals.

Since plaintiff moved only for judgment notwithstanding the verdict, the only question on appeal is whether the evidence is conclusive against the verdict. National Cash Register Co. v. Merrigan, 148 Minn. 270, 181 N. W. 585. Errors in rulings on the trial, or in the charge, furnish no ground for judgment notwithstanding the verdict.

A determination of the question whether the evidence is conclusive against the verdict, involves a consideration of the nature of this guaranty and of the rights of the parties under it.

1. No notice of acceptance of the guaranty was required. In general it may be said that an agreement to accept an offer of guaranty of future indebtedness is the material assent necessary to complete a valid contract between the guarantee and the guarantor. Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N. W. 36; Northern National Bank v. Douglas, 135 Minn. 81, 160 N. W. 193; Burns v. Poole, 106 Minn. 69, 118 N. W. 156. But the agreement to accept may precede the execution of the contract by the guarantor, and, when an instrument of guaranty is executed and delivered, not as an offer of guaranty, but as an acceptance of a proposition coming from the guarantee, no further notice to the guarantor of acceptance by the guarantee is necessary. Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63, 63 N. W. 245. See also J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966; Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924. This is just such a case. Plaintiff made the proposition to take the guaranty of defendant. When defendant executed and delivered the guaranty, the proposition was accepted and the contract was complete.

2. The guaranty is a guaranty of collection, not of payment. A

guaranty "against loss" is a guaranty against loss from failure to collect. See 20 Cyc. 1447.

Before resort can be had to the guarantor on such a guaranty, the creditor must exhaust his remedy against the principal, that is, he must bring suit against him, prosecute it to judgment and return of execution, unless it is made to appear that the principal is hopelessly insolvent. Brackett v. Rich, 23 Minn. 485, 23 Am. Rep. 703; Crane v. Wheeler, 48 Minn. 207, 50 N. W. 1033. There is no evidence that plaintiff proceeded against the principal in this case, nor that the principal was hopelessly insolvent. There is evidence that he was forced into involuntary bankruptcy in 1918, but no showing as to the condition of his estate, nor as to whether he was discharged from his debts, nor as to his present financial condition.

3. Perhaps the most decisive question in the case is whether the guaranty continued and covered items of goods sold in 1918. We are of the opinion that, under the evidence in this case, that question was one of fact for the jury. The language of the guaranty is not decisive. The broadest language in a continuing guaranty is construed as limited to a time which is reasonable, taking into consideration, not merely the language of the guaranty, but all the circumstances of the case. Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63, 63 N. W. 245. When no time is fixed and there is nothing in the agreement indicating a continuance of the undertaking, the presumption is in favor of a limited liability as to time. Twohy v. McMurran, 57 Minn. 242, 59 N. W. 301. See also Birdsall v. Heacock, 32 Oh. St. 177, 30 Am. Rep. 572; Finnucan v. Feigenspan, 81 Conn. 378, 71 Atl. 497.

In this case the demand for the guaranty and the giving of the guaranty were prompted by the large initial sale in the summer of 1916. Nothing was said in the correspondence as to other purchases. The words "sold or to be sold" in the contract do not necessarily imply a continuing transaction. The original sale had not yet been concluded. The account was virtually closed in 1917 and remained closed for more than six months when it was again opened in February, 1917. Clearly there is evidence to sustain a finding that these 1917 sales were not within the contemplation of the contract of guaranty.

Judgment affirmed.

IN THE MATTER OF THE APPLICATION OF THE DULUTH & NORTHERN MINNESOTA RAILWAY COMPANY TO ABANDON AND CLOSE FOR TRAFFIC ITS RAILWAY. STATE v. DULUTH & NORTHERN MINNESOTA RAILWAY COMPANY.[1]

July 22, 1921.

No. 22,423.

Abandonment of line of railroad.

1. Unless a railway company has contracted to keep its road in operation, it has the constitutional right to abandon it if it can no longer be operated except at a loss.

Railroad commission cannot authorize abandonment because of loss in operation.

2. Although a railway company may have the constitutional right to abandon its road for the reason that it can be operated only at a loss, the legislature has withheld from the Railroad and Warehouse Commission power to authorize an abandonment on that ground.

In the matter of the application of the Duluth & Northern Minnesota Railway Company for permission to abandon and close its railway for traffic, the attorney general appealed to the district court for Lake county from an order of the Railroad and Warehouse Commission authorizing the company to abandon its road and close it to traffic on and after April 1, 1921. From an order, Daly, J., granting the attorney general's motion to vacate the order of the commission, the railway company appealed. Affirmed.

Washburn, Bailey & Mitchell, for appellant.

Clifford L. Hilton, Attorney General, *C. H. Christopherson,* Assistant Attorney General and *Henry G. Carleton,* Special Assistant Attorney General, for respondent.

[1]Reported in 184 N. W. 186.

Joseph Meyer and *B. F. Fowler,* County Attorney of Lake County, filed a brief as amici curiae.

TAYLOR, C.

The Duluth & Northern Minnesota Railway Company made an application to the Railroad and Warehouse Commission for permission to abandon its railroad. The commission held extended hearings and on December 20, 1920, made an order authorizing the company to abandon the railroad and close it to traffic on and after April 1, 1921. The attorney general appealed from this order to the district court, and, at the hearing before the court, made a motion to set aside and vacate the order, on the ground that the facts found by the commission show that the commission had no power to make it. The court granted this motion by an order which, although somewhat peculiarly worded, unquestionably revoked the permission to abandon the road granted by the commission. The company appealed.

The statute provides:

"No company operating any line of railroad in the state of Minnesota shall abandon the same or any portion thereof, nor shall it abandon any siding, sidetrack, spur or other railway track of any kind which has once been opened and used for business, nor shall it close for traffic thereon except as provided in section 4424 as the same is hereinafter amended. Any company violating any provision of this section shall forfeit to the state not less than two hundred dollars nor more than one thousand dollars for each day such violation continues." Section 4423, G. S. 1913.

"Any such company desiring to abandon or close for traffic any portion of its line, siding, sidetrack, spur or other railway track, shall first make application to the commission in writing. Before passing upon such application the commission shall fix a time and place for hearing and require such notice thereof to be given as it deems reasonable. Upon the hearing, the commission shall ascertain the facts and make findings thereon, and if such facts satisfy the commission that the proposed abandonment or closing for traffic will not result in substantial injury to the public, they may allow the same, otherwise, it shall be de-

nied, or, if the facts warrant it, the application may be granted in a modified form." Section 4424, G. S. 1913.

From the findings of fact made by the commission it appears that the railway company was organized under the laws of the state of Minnesota in 1898; that the railroad extends from Knife river on the shore of Lake Superior northerly and northeasterly through Lake county into Cook county roughly parallelling the shore of the lake; that it was constructed in connection with the logging operations of the Alger-Smith Company and has always been financed, managed and controlled by that company, and stockholders of that company; that the earnings of the railroad have come mainly from the traffic furnished by the logging operations of that company; that that company has disposed of all its timber in the territory tributary to this road and no more traffic can be expected from that source, and that the road can be operated in the future only at a very substantial loss.

The commission made further findings to the effect that there was no public necessity for that portion of the road extending beyond the station of Cramer; that the road could be discontinued without serious inconvenience to residents along that portion of the line extending from Knife river to a point 15 miles beyond the station of Algers, a distance of about 32 miles, as they have access to other railroads, but that the discontinuance of the road would compel some 500 residents living along that portion of the line extending from the point 15 miles beyond the station of Algers to the station of Cramer, a distance of about 25 miles, either to ship out their products and bring in their supplies by water during the season of navigation, or haul them over wagon roads for distances varying from 15 to 40 miles.

After making these findings of fact and quoting from the statute and from the decision in Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. ed. 323, in which it was held that a carrier cannot be compelled to carry on its business at a loss and may cease operating a railroad when it can be operated only at a loss, the commission stated:

"In view of the fact that the Duluth and Northern Minnesota Railway Company cannot operate its line of road except at a loss, the commission finds that the Duluth and Northern Minnesota Railway Company have the right to abandon the operation and use of the same as a common carrier * * * Therefore it is ordered that the Duluth and Northern Minnesota Railway Company are hereby permitted to abandon and close for traffic its line of railroad * * * after April 1st, A. D. 1921."

The court revoked this order on the ground that that statute had not given the commission power to authorize the abandonment of a railroad on a finding that it could be operated only at a loss, without a further finding that such abandonment would not result in substantial injury to the public.

That this railroad can be operated in the future only at a substantial loss, is not only found as a fact by the commission, but stands undisputed so far as the record before us discloses.

That a railroad company cannot be compelled to continue to operate its railroad when such operation can be carried on only at a loss, is settled by the decisions of the United States Supreme Court. Brooks-Scanlon Co. v. Railroad Comm. 251 U. S. 396, 40 Sup. Ct. 183, 64 L. ed. 323; Bullock v. State, 254 U. S. 513, 41 Sup. Ct. 193, 65 L. ed. —. These cases hold that to compel it to do so would be taking its property without compensation in violation of the rights secured to it by the Federal and state Constitutions. Of course a railway company which has assumed contractual obligations requiring it to operate its road may be compelled to do so, for railway companies, as well as individuals, are required to perform their contracts, but there is no claim that any obligation of that sort exists in the present case. If in fact the road can be operated only at a loss, the company has the legal right, under the Federal decisions, to close it to traffic and dismantle it.

Whether, where a railway company claims the right to abandon and dismantle its road on the ground that it can be operated only at a loss, the state may require the company to accept the junk value of the road, if there can be a purchaser who will take it at such value and undertake to continue it in operation, has been considered to some extent by the

courts as is shown by the decisions cited in the note found in 8 A. L. R. at page 238, but that question is not involved in this case.

The statute, under which this proceeding was brought, was enacted long before the Federal Supreme Court announced that a railway company had the constitutional right to abandon its road, unless it could be operated at a profit, and the legislature, in enacting the statute, apparently did not have in mind such a situation as is here presented, and made no provision for it. While it might seem desirable that the question whether a railway company has the right to abandon its road because it cannot be operated at a loss, should be determined in some orderly and authoritative manner before the road is closed to traffic, and while the Railroad and Warehouse Commission is probably the only agency of the state which possesses the facilities and machinery for ascertaining and determining the questions of fact involved, yet that commission possesses only the authority given to it by the legislature and cannot exceed the bounds to its power fixed by the legislature.

It is urged that the legislature has not empowered the commission to authorize the abandonment of an entire line of railroad under any circumstances, but it is not necessary to determine that question in this case. The statute, after providing for a hearing, further provides:

"Upon the hearing the commission shall ascertain the facts and make findings thereon, and if such facts satisfy the commission that the proposed abandonment or closing for traffic will not result in substantial injury to the public, they may allow the same, otherwise, it shall be denied." [Section 4424.]

By this provision the legislature has expressly limited the power of the commission to authorize an abandonment to those cases in which they find as a fact that such abandonment "will not result in substantial injury to the public." They did not find such fact in the present case; on the contrary, they found, in effect, that the proposed abandonment would result prejudicially to a large number of permanent residents served by the road who have no other convenient access to the markets of the country. Consequently, by reason of the express limitation imposed by the legislature, the commission was without power to make the order here in question. Of course insofar as the prohibitory provi-

sions of the statute infringe the constitutional rights of the company. such provisions cannot be enforced. But the only question here presented is whether the commission assumed to exercise a power which it did not possess, and, as we find that it did, the order of the trial court is affirmed.

PHILIP HALL v. JAMES C. DAVIS, AS AGENT OF THE PRESIDENT UNDER THE TRANSPORTATION ACT.[1]

July 22, 1921.

No. 22,425.

Escape of fire from locomotive — finding of negligence sustained.
The evidence examined and *held* to sustain the findings.

Action transferred to the district court for St. Louis county to recover $7,460 for destruction of property by fire caused by locomotives of the Great Northern Railway Company. The case was tried with others before Cant, Hughes, Dancer, Fesler and Freeman, sitting en banc. The court, Cant, J., made findings and as conclusions of law ordered judgment in favor of plaintiff for $7,400. Defendant's motion to amend the findings was denied. From an order denying its motion for a new trial, defendant appealed. Affirmed.

M. L. Countryman and *Baldwin, Baldwin, Holmes & Mayall,* for appellant.

Arnold & Arnold, J. E. Diesen and *Cox & Michaelson,* for respondent.

HOLT, J.

Action against the director general of railroads for negligently setting and allowing a fire to escape, while in control of the branch of the Great Northern Railroad running from Cloquet northwesterly to Floodwood, Minnesota, the fire so set having reached and consumed plaintiff's property in the city of Cloquet, on the evening of October 12, 1918.

[1]Reported in 184 N. W. 25.

This action and 277 other actions of like nature were, by stipulation, consolidated and tried to five judges, without a jury, to determine the issue of liability, and, if defendant was held liable, the amount of damages was thereafter to be ascertained in each case before any one judge. There was a determination that the director general's negligence caused the destruction of the property of the various plaintiffs, and the loss in the case of this plaintiff was thereafter fixed. The director general moved for amended findings or a new trial. The motion was denied, and this appeal followed.

Mile post 62, on the railroad mentioned, is a few rods south of the bed of St. Louis river, 3½ miles east of the station Paupores. The river runs nearly east from the station to mile post 56, a mile east of Brookston; thence about southeasterly to mile post 52, near Brevator; thence northeasterly to mile post 50; thence southeasterly to mile post 47; thence southwesterly to mile post 45; thence a little east of south entering the northwest corner of the city limits of Cloquet between mile posts 43 and 42 and continuing southeasterly to a point about equidistant from the north and south boundaries of the city; thence directly east through the center of the city limits. The railroad follows the bank of the river closely all the way. A short distance from the river banks, hills rise on either side, more or less abruptly, to various heights from 100 to upwards of 200 feet. From the description of the course of the river, it can be seen that Cloquet is almost due southeast from mile post 62. The distance between the two points is about 20 miles by rail and about 13 miles by a direct line. The territory south of the river, extending for 20 or more miles west of Cloquet, is quite broken with hills, valleys, swamps, lakes and brooks. In some parts are quite a few settlers with small clearings. Nearly all is cut-over land. The season prior to October 12, 1918, had been unusually dry. In the region mentioned fires had run. Efforts to extinguish and control these fires had been made with more or less success. The record leaves the impression that in stumps and bogs there may have been smolderings on the twelfth of October.

The issue, as made by the pleadings, was that a locomotive passing mile post 62 on October 10, 1918, set a fire, which communicated with

and ignited a quantity of forest products piled at a spur track at that place; that effective means to extinguish this fire were not taken; and, when on the twelfth a strong wind arose, the whole stock there piled burned with great intensity, the flames spreading to adjacent ground and running at a fearful speed with the wind, which was claimed to then come from the northwest and heading towards Cloquet. The director general contended that the fire at mile post 62 was not of a railroad origin, and, particularly, that the fire which came to the city was of unknown origin, starting far south of the railroad right of way; and, further, that the wind was almost due west or not more than 20 degrees north of west, so that it was impossible for a fire from mile post 62, or for any fire on its right of way west of Brevator, to travel and spread enough to the south, in the gale then blowing almost due east, so as to reach Cloquet.

The court found, in substance, that the director general, while he operated said railroad, allowed combustible material to accumulate on and along the right of way between mile posts 52 and 64, and permitted large quantities of forest products to be stored at mile post 62; that no men were employed to patrol that part of the right of way to watch for and extinguish fires thereon; that while so operating the road, under the conditions mentioned, and on October 10, 1918, a locomotive engine passing mile post 62 set fire to the dry material in the immediate vicinity thereof; that the director general negligently failed to extinguish such fire, which, on the twelfth of October, caused all of the material so stored to be consumed, and, spreading therefrom to the lands adjacent and over and across said lands to the premises of plantiff in Cloquet, consumed the property described in the complaint.

No question is made of the damages awarded. And, with the commendable candor characteristic of defendant's able counsel, concessions were made, on the oral argument, that narrow the appeal down to the one question whether the evidence sustains the conclusions of the four judges, who concurred in the finding, that the first fire to reach and cause the conflagration in Cloquet was the one from mile post 62. The concessions alluded to relate to the conclusions of the court, as disclosed by the memoranda attached to the findings and to the order denying

a new trial, that the director general's negligence set the fire at mile post 62 on the tenth which burst into a great and destructive conflagration on the twelfth, and that the gale during the afternoon and evening of the last named day came from the northwest. Counsel do not concede that the court ought to have reached such conclusions, but that, having done so, this court, under the well settled rules guiding it, cannot hold that the conclusions are without adequate support, or that the court erred in refusing to make findings of contrary purport as requested by appellant.

We think also that appellant is on this appeal entitled to the benefit of the conclusion expressed in the memoranda that the evidence, though reasonably clear, was insufficient to establish that such fire as was in section 6 of town 50, range 17, and sections 1 and 2 of town 50, range 18, that evening never reached Cloquet, or mingled with the one that came from mile post 62. But the trial court was clear that the last mentioned fire reached the city first, and that the fires which originated more southerly and westerly, whether of unknown or railroad origin, came later and did not contribute to the destruction of the city. Defendant's counsel earnestly maintains that the court was demonstrably wrong in this. We think not. The nature and direction of the wind as the fire swept on, and the testimony of witnesses in the path of the most northerly as in the ones to the south thereof, seem to establish with reasonable certainty that the north fire, the one from mile post 62, came to the city first. From a comparison of the time so given by these various witnesses and the positions they occupied in the burned territory when the main flames passed them, it rather persuasively appears that when the fire, so destructive of life and property, raged through sections 1 and 2, town 50, range 18, and section 7, town 50, range 17, the north fire had already entered the upper planer or lumber district of the city.

Of course we realize that estimates of time under the stress and excitement attending a calamity of this nature are not very accurate; also that timepieces in country districts are seldom correct. It is also true that the speed of fires varies exceedingly with the nature of the territory over which they pass, and the amount and kind of material upon which

the flames feed. When the wind is so strong as on the day in question, fire brands are carried to great distances and the further progress depends upon the stuff into which the brands fall and whether the wind has full sweep over it. The experienced and painstaking judges who for five weeks gave these and other matters, too numerous to here call attention to, careful consideration, were satisfied that the fire from mile post 62 reached Cloquet first. One of the judges was alone in the opinion that plaintiff had not sustained the burden of establishing beyond speculation and conjecture that any fire, originating from the railroad operated by the director general, materially contributed to the destruction of plaintiff's property. We think the findings made by the court are amply sustained.

The court evidently refrained purposely from expressing conclusions as to the origin and course of the fire which started between mile posts 67 and 68, and as to whether the one from mile post 62 separated near the dam on Stony Brook, in section 16, town 50, range 18, one part passing to the north and east of Cress lakes and the other to the south of those lakes, since such conclusions might relate to the destruction of property not owned by any of the plaintiffs in the suits here involved.

It is not practical to here reproduce the maps used at the trial, but in those maps and other exhibits are indications by way of areas not burned, the shape of such areas, the contour of the ground, the location of swamps, lakes and creeks, the open fields and meadows, the light and hard burned parts which fortify not only the wind directions in accordance with the conclusions of the trial court, but also the findings of the majority that the fire negligently allowed to escape from the locomotive operated by the director general at mile post 62 spread to and caused the destruction of the property involved in the actions tried.

The evidence, in our opinion, sustains the findings.

Affirmed.

T. P. HAMRE v. CITY OF THIEF RIVER FALLS AND OTHERS. GEORGE C. STREETER, INTERVENER-APPELLANT.[1]

September 8, 1921.

No. 22,601.

Resolution of city council—approval by mayor.

1. A resolution to pave, passed by the city council on March 19, 1920, was approved by the mayor on March 23, 1920. The law forbids the mayor to sign the same within four days after its presentation to him, but provides that, if not returned within ten days after presentation, it shall take effect without being approved. It is *held* the approval was nugatory, and the resolution cannot be considered as returned, either as approved or vetoed, and went into effect as for failure of the mayor to act.

Evidence — offer rightly refused.

2. The offer to prove that the paving was undertaken when prices were the highest was rightly excluded.

Remedy against wrong plan of assessment.

3. If the plan proposed to be adopted in assessing the cost of the pavement is wrong, the law gives a remedy in the assessment proceeding.

Condition of city treasury immaterial.

4. The condition of the city treasury is not a material question in this action.

No error.

5. No reversible error is found in the record.

Action in the district court for Pennington county to enjoin the performance of a certain paving contract. The facts are stated in the opinion. The matter was heard by Grindeland, J., who made findings that all proceedings leading up to the execution of the contract for the paving were in accordance with law, denied the application of the intervener for a temporary injunction and dismissed the action both on the

[1]Reported in 184 N. W. 225.

part of the plaintiff and the intervener on the merits. From the judgment entered pursuant to the order for judgment, intervener appealed. Affirmed.

E. M. Stanton, for appellant.

H. O. Crommie, for respondent city and officials.

Shaw, Safford, Ray & Shaw, for respondent Bitulithic & Contracting, Limited.

Theodore Quale, attorney for plaintiff, filed a brief as amicus curiae.

HOLT, J.

Suit by plaintiff, a taxpayer of Thief River Falls, a city organized under chapter 8, p. 16, Laws 1895, and amendatory acts, to enjoin the performance of a paving contract made by the city with the Bitulithic and Contracting, Limited, a corporation. The city and its officers, the corporation named, and also another corporation which undertook to sell city certificates to finance the improvement, are defendants. The corporation last referred to has no longer any interest in the litigation and the matters relating to it need not be noticed.

Before coming to a consideration of the questions presented upon this appeal, it is necessary to refer to some of the steps taken in court as to this paving proposition. The present appeal is by an intervener, who came into the case as soon as the summons was served. Plaintiff's complaint is lengthy and alleges various grounds for challenging the proceedings leading up to the paving contract. The intervener is like plaintiff a taxpayer, owning lots abutting the streets to be paved, and his complaint in intervention contains the very same allegations contained in plaintiff's complaint, with the addition of certain facts which the court found true in respect to other actions previously brought by other taxpayers and property owners, represented by the attorney who represents the present plaintiff. The latter facts are in short these:

Immediately after the resolution to pave was adopted by the city and the bid of the Bitulithic corporation accepted, M. V. Evenson and other taxpayers and abutting owners brought suit in behalf of themselves and others similarly situated to enjoin the paving. The complaint stated in substance the same grounds as in this action. When the plaintiffs

therein applied for a temporary injunction, a demurrer to their complaint was heard also. June 8, 1920, the court denied the application and sustained the demurrer. An appeal to this court was perfected, but was by stipulation dismissed "with prejudice." In February, 1921, the same attorney in behalf of Oen Mercantile Company began a suit against defendants substantially in the same form as in the Evenson and the present cases. It was set for trial June 30, 1921, but when reached the plaintiff, against defendants' objection, dismissed the suit, and on the same day started the present action. As soon as the intervener herein served the complaint of intervention, he obtained an order to show cause why a temporary injunction should not issue. When this came up for hearing the court was requested by intervener and defendants to hear the cause on the merits. This was done over the objections and protests of plaintiff. The court concluded that there had been an effort to delay an adjudication, heard the evidence and made findings, in substance, holding valid all steps taken in ordering the pavement and executing the contract for the improvement.

The intervener appealed from the judgment entered on the findings and joined with defendants in a request for a speedy hearing. Plaintiff has taken a separate appeal. He was given the opportunity to submit his appeal with intervener's, or to file a brief amicus curiae. He chose the latter. We remark here that no assignments of error not available to the intervener can be urged by plaintiff as amicus curiae, such as the ones that the court could not hear the cause on its merits on the motion for a temporary injunction, for intervener requested that be done, or that there was error in dismissing plaintiff's complaint on the merits, for that does not affect intervener. It is patent that there has been an effort to prevent the contemplated pavement by protracted litigation. It is also clear that intervener came in to block such effort. We need say no more about the tactics pursued or intervener's standing in court, except that the intervention is unquestionably proper. Intervener occupies the same relation as plaintiff to the proposed paving, and stands to lose or gain by a determination of the issues tendered by plaintiff's complaint.

The main point relied on by intervener for a reversal is that the

mayor acted prematurely when he approved the resolution ordering the pavement laid. If this resolution is invalid no subsequent action of the city council or mayor could give authority to proceed with the paving. The resolution was passed by the city council on March 19, 1920, and the approval was dated March 23. The following sections of chapter 8, pp. 34, 35, Laws 1895, are pertinent:

"Every ordinance, order and resolution shall, before it takes effect, be presented to the mayor for approval. If he approves he shall sign the same, but if he disapprove it, he shall return it to the city council with his objections thereto." Section 59.

"No ordinance, order or resolution shall be signed by the mayor within four (4) days after the same is presented to him, and if the same shall not be returned by him on the tenth (10) day (Sunday excepted) after it shall have been presented to him, it shall have the same force and effect as if approved by him." Section 61.

"The city clerk shall indorse upon each such ordinance, order and resolution the time when the same was delivered to the mayor, and the time when it was returned to his office by the mayor." Section 62.

The approval of the mayor was premature. If section 61 be mandatory, the approval was nugatory and of no more effect than if some other person had undertaken to sign an approval thereon. There was then not a return of the resolution either duly approved or vetoed within ten days after its presentation, and it thereupon became effective under the last clause of the section. That the resolution was presented to the mayor, is indicated by his signature thereon, even though it has not the legal effect of an approval. The failure, if such there be, of the city clerk to comply with section 62 could not invalidate the resolution. After the resolution was presented to the mayor, he could prevent or hinder its taking effect only in one way, by returning it vetoed within ten days. That alone would have given rise to further action by the council. The law should not be so construed that, by a premature approval of an ordinance or resolution and returning it within the ten days from its presentation, a mayor could effectively tie the hands of the city council on the proposition, for such a premature approval cannot be held a veto.

The court rightly excluded proof offered that the improvement was undertaken when prices therefor were the highest. There was no averment nor offer of proof that the city council members were actuated by improper motives or exercised their judgment arbitrarily.

That the official charged with the duty of assessing the cost to the abutting property intends to adopt some method that appellant considers illegal, cannot be a ground for injunctive relief now. The law provides for a hearing when the time arrives for making the assessment, chapter 65, p. 62, Laws 1919. There is an adequate remedy at law, and the objection here made is premature.

That the financial condition of the city is not a material issue in this action, seems to follow from the decision in Pike v. City of Marshall, 146 Minn. 413, 178 N. W. 1006, for the abutting property owners and not the city will ultimately pay nearly the whole of the cost. That decision also determines adversely to appellant other grounds alleged in the pleading for relief.

It is intimated that the direction or order to the city clerk, found in the minutes of the council meeting of February 24, 1920, to publish the notice to property owners that the meeting of March 19, 1920, would be held to consider and determine whether this paving should be done, invalidated all subsequent proceedings because such direction or order was not approved by the mayor. This so-called order does not come within the meaning of the words "ordinance, order or resolution," in the sections above cited. It is a mere direction to an agent or officer of the city to do a ministerial or administrative act. Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325.

Judgment affirmed.

JAMES A. LUCAS AND THOMAS S. INGENHUTT, CO-PARTNERS DOING BUSINESS AS LUCAS & INGENHUTT v. FRANK CASE.[1]

September 16, 1921.

No. 22,305.

Action for purchase price — counterclaim sustained by evidence.

1. In an action by a purchaser to recover an alleged overpayment on a sale of ice, defendant counterclaimed, alleging loss of ice through fault of plaintiffs. The evidence sustains a verdict for defendant on this counterclaim.

New trial — newly discovered evidence.

2. The showing as to newly discovered evidence is not sufficient to warrant a new trial.

Trover and conversion — when demand is necessary.

3. The evidence is not sufficient to sustain a verdict on a counterclaim for conversion of certain ice tools. Plaintiffs came by the tools rightfully. There was no demand for their return. This was essential to establish conversion.

Verdict sustained by evidence.

4. The evidence sustains a verdict that plaintiffs did not leave the ice house in the condition it was in when they took possession in that a platform and certain lumber had been removed.

Action in the municipal court of Minneapolis to recover $557 overpayment upon a contract. Defendant counterclaimed as stated in the first paragraph of the opinion. The case was tried before Montgomery, J., and a jury which returned a verdict for $400.56 in favor of defendant. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

Stevens & Stevens, for appellants.

Youngdahl & Halls, for respondent.

[1]Reported in 184 N. W. 837.

HALLAM, J.

1. In April, 1917, defendant sold to plaintiffs the ice in a certain ice house. It was estimated that there were 1,400 tons of ice. The price fixed was $2.50 per ton. One thousand dollars was paid down and plaintiffs agreed to pay instalments of $2.50 per ton as the first 400 tons were removed and $1.50 per ton thereafter. Plaintiffs removed 843 tons, and, having made payments as provided by the contract, claimed an overpayment, and sued to recover the amount alleged to have been overpaid. Defendant counterclaimed, claiming that much of the ice was lost by the negligence of plaintiffs, claiming conversion of certain tools and the negligent loss of a loading platform and certain lumber. The jury found a verdict for defendant on his counterclaim in the sum of $400.56. Plaintiffs appeal.

We are of the opinion that there is evidence sufficient to sustain the verdict as to the negligent loss of ice.

2. Plaintiffs ask a new trial on the ground of newly discovered evidence bearing on this question. The alleged newly discovered evidence is largely cumulative and there is not sufficient showing that it could not have been procured on the trial.

One item of alleged newly discovered evidence is not cumulative. It is to the effect that defendant himself took a large quantity of ice from the ice house after the sale. Defendant in an affidavit denies this. He admits receiving a small quantity of ice after the sale, but avers that he paid for it. This is not denied. The showing on this point is not sufficient to warrant a new trial.

3. We are of the opinion that the evidence as to conversion of tools is not sufficient. The tools had been used by defendant in his ice business. He loaned them to plaintiffs for use in removal of the ice and testified he told plaintiffs to return them when they were through with them. With the last load of ice, the tools were taken to plaintiffs' premises. Defendant was present and assisted in the loading and removal of this load of ice. No demand was made for the tools and apparently nothing was said about them. Nor was demand made at any time. Plaintiffs exercised no dominion over them. Since plaintiffs came by

them rightfully, this want of a demand is fatal to an action for conversion. Boxell v. Robinson, 82 Minn. 26, 84 N. W. 635.

Defendant cites authority to the effect that proof of an agreement to return and failure to return according to agreement, constitutes conversion. 38 Cyc. 2032; Durell v. Mosher, 8 Johns. (N. Y.) 445; Lay's Exr. v. Lawson's Admr. 23 Ala. 377. Whether this constitutes conversion has not been decided in this state. Under some circumstances perhaps it may. We find no authority that would sustain conversion under the facts in this case. When the tools were loaned there was a mere request to plaintiffs to return them when they were through using them, with no suggestion as to when or where return was to be made. When we take this fact in connection with the apparent assent of defendant to the taking of the tools to plaintiffs' premises, it seems clear that the proof fails to bring the case within the rule of the authorities cited by plaintiffs. The evidence is that the tools were worth $75 to $100. The answer alleged their value to be $70.75 and the court limited recovery on this counterclaim to that amount.

4. The evidence is sufficient to sustain liability for the value of the platform and lumber. Plaintiffs agreed in their contract to leave the ice house "in the same condition that it now is in and to remove none of the fixtures connected therewith." The lumber in question was used for boarding doors and openings and both platform and lumber were essentially part of the ice house. Defendant's evidence is that, when plaintiffs left the ice house, the platform and lumber were gone. Some question is raised as to the pleading of this counterclaim. We think the pleading sufficient to permit the proof that was made of breach of contract.

A new trial will be granted unless within ten days of the going down of the remittitur, defendant consents to the reduction of the verdict by $70.75.

Order modified.

M. W. SAVAGE FACTORIES, INC. v. CANADIAN NORTHERN RAILWAY COMPANY.[1]

September 23, 1921.

No. 22,326.

Carrier — bill of lading — embezzlement by station agent.

Defendant was the last carrier of an intrastate shipment, shipped under an order bill of lading by plaintiff to its order "notify R. L. Brown." Defendant's station agent delivered the shipment to Brown, the purchaser, without the bill of lading being presented, but received full payment for the goods. The agent absconded without turning over the money to either plaintiff or defendant. In this action for conversion it is *held*: That provisions in the bill of lading that suits for loss or damage to the shipment must be brought within a specified time, and that notice of loss or damage must be filed in writing within a certain time, do not cover a loss resulting from the facts herein found, following Bardwell v. American Express Co. 35 Minn. 344.

Action in conversion in the municipal court of Minneapolis to recover $56.47 for delivery of merchandise without presentation of the order bill of lading. The case was tried before Baldwin, J., who made findings as set out in the first paragraph of the opinion and ordered judgment in favor of plaintiff for $50.05. From an order denying its motion for a new trial, defendant appealed. Affirmed.

Hector Baxter and *William T. Kelsh,* for appellant.

C. E. Warner, for respondent.

HOLT, J.

The findings of fact are not challenged by any assignment of error, and are to the effect that plaintiff, engaged in business at Minneapolis, Minnesota, on December 6, 1916, shipped goods to R. L. Brown at Roosevelt, Minnesota, of the value of $50.05, the goods to be delivered on payment of that sum; that the goods arrived at defendant's station

[1]Reported in 184 N. W. 367.

at Roosevelt, and were by its station agent delivered to Brown, without the presentation of the order bill of lading, upon payment to the agent of the amount due plaintiff, and more; that defendant's agent absconded and failed to turn over the money to plaintiff or to defendant; and "that plaintiff's claim on account of the failure to remit the amount due on said C. O. D. shipment was filed with defendant company on the 11th day of February, 1919." Judgment was ordered for plaintiff for $50.05 and interest. The appeal is from the order denying a new trial.

The order bill of lading, under which the shipment was made, directed the delivery to be made to the order of plaintiff, "notify R. L. Brown," and contained this provision: "Suits for recovery of claims for loss, damage or delay shall be instituted only within two years after delivery of the property, or, in case of failure to make delivery, then within two years after a reasonable time for delivery has elapsed." There was also a provision that notice of claim of loss or damage must be filed in writing within four months after delivery. The assignments of error raise only the proposition whether the court erred in refusing to order judgment for defendant because the suit was brought more than three years after delivery of the shipment, and because the notice of claim was not filed within the time limited.

The points of shipment and destination were in this state, defendant being the last carrier. The answer averred that if the shipment was made it was interstate. This was denied in the reply. There was no finding or requested finding on that issue, nor do the stipulated facts tend to prove that it was interstate. We must therefore treat it as intrastate. Under the facts found the goods were delivered by the defendant's agent to the party who was to have them, and he in turn paid the agent the full purchase price or value that plaintiff was to receive. The agent was in charge of defendant's business at Roosevelt, and what he did or failed to do in the premises must be held to be the act or omission of defendant. The legal effect would then be that defendant received money to the use of plaintiff, and by failing to turn it over converted it. The loss sustained by plaintiff from the failure to turn over the money so obtained, has by this court been held not to be a loss

or damage covered by the provisions in the shipping contract referred to. Bardwell v. American Express Co. 35 Minn. 344, 28 N. W. 925. Therefore the defense sought to be made is not available under the facts found.

Order affirmed.

DROVERS CATTLE, LOAN & INVESTMENT COMPANY v. ELIZABETH McGRAW.[1]

September 23, 1921.

No. 22,467.

Contract — parol evidence admissible to show when it was to take effect.

1. Parol evidence *held* admissible to show that a contract in the form of a promissory note delivered by the maker to the payee, the plaintiff, was not intended to be operative as a contract from its delivery, but only on the failure of the maker to keep and perform all the conditions of the agreement.

Verdict sustained.

2. Evidence considered and *held* sufficient to justify the verdict.

Charge to jury.

3. Charge of the court considered and *held* not to contain any reversible error.

Conduct of counsel.

4. There was no reversible error in the conduct of counsel for defendant in his argument to the jury.

Action in the district court for Meeker county to recover $1,038.91 upon a promissory note. The facts are stated in the opinion. The case was tried before Daly, J., who at the close of the testimony when both parties rested denied plaintiff's motion for a directed verdict, and a jury which returned a verdict in favor of defendant. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

[1]Reported in 184 N. W. 365.

Alva R. Hunt, for appellant.
N. D. & C. H. March, for respondent.

QUINN, J.

Action to recover a balance claimed to be owing upon a promissory note executed by the defendant May 20, 1919, whereby she promised to pay to the order of the plaintiff, on October 15 thereafter, the sum of $3,355.47, with interest at 8 per cent. The answer in effect alleges that, at the time of the making of the note, the defendant purchased from plaintiff and Swanson & Gearen, 62 head of cattle then in the stockyards at South St. Paul; that as a part of said contract of sale plaintiff and W. E. Gearen stated to defendant that, if she would pay to them $300 cash and give plaintiff a note and chattel mortgage on said cattle for $3,355.47, and take them to her farm in Meeker county and pasture, feed and care for the same until plaintiff or Swanson & Gearen called for them, and then ship them back to South St. Paul, as plaintiff or Swanson & Gearen might direct, they would receive and sell the cattle, and, if they sold for more than the amount of the note, they would turn over the overplus to the defendant, and that in no event would she be asked to pay any sum or amount other than the first $300, and that they would look to the cattle for the payment of the note. That, relying upon said statements, the defendant entered into the contract and paid the sum of $300 by check and signed the note in question. That thereupon defendant took said 62 head of cattle to her farm, pastured and cared for them from May, 1919, to November, 1919; that on or about November 1 Gearen requested defendant to send the cattle to South St. Paul to the Haas Commission Company, and pursuant thereto defendant did ship all of said cattle save three that had died, to the Haas Commission Company as requested. That on November 6 the plaintiff notified defendant that the Haas Commission Company had turned over to them $2,441.82 to apply on the note, and that there still remained due thereon a balance of $1,023.99 and interest. That the defendant has in all things performed her part of said agreement and that she returned the cattle as requested and has received nothing for

pasturing and caring for the same. The reply puts in issue the allegations of the answer.

The cause was tried and submitted to a jury and a verdict returned in favor of the defendant. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, plaintiff appeals.

In April, 1919, defendant resided upon a farm of 320 acres in Meeker county, this state, which her husband owned and at his death left to the defendant and their seven children. On the trial defendant offered and was permitted, against plaintiff's objection to its competency, to prove by parol that, notwithstanding the delivery of the note, it was intended by the parties that it would become operative as a contract only in case she failed to live up to the terms of her contract in caring for and returning the cattle for sale in the fall and applying the proceeds thereof in extinguishment of the contract. The competency of such testimony is the only serious question in the case. The objection thereto was that it constituted an attempt to vary the effect of a written contract by parol.

Defendant testified, in effect, that she went to South St. Paul to procure some cattle to feed during the summer months. That she met Mr. Gearen, of the firm of Swanson & Gearen, dealers in cattle, and entered into an agreement to take 62 head of cattle at $9.25 per cwt, amounting to the sum of $3,655.47, agreeing to pay $300 cash to take the cattle to her farm, pasture and care for them during the summer and in the fall return the same to Swanson & Gearen for sale as they might direct. That by such agreement they were to sell the cattle, apply the proceeds on the note and pay Mrs. McGraw the overplus, if any there was, less freight and commission. That thereafter Mr. Gearen requested her to go with him to the plaintiff's office and have Mr. Green, who it appears was the secretary and treasurer of plaintiff and assistant cashier of the Drovers State Bank of South St. Paul, prepare the note and mortgage. That the plaintiff's office was in the banking rooms of the Drovers State Bank. That they there met Mr. Green and informed him of their purpose and Mr. Green questioned her about the amount of property she had, etc.; that she then informed him of the terms and conditions of the agreement, and he told her that the agreement would

stand and that it was understood and agreed that they were to look to the cattle for the payment of the note, and that defendant would be asked to pay the note only through the sale of the cattle, and that she then signed the note which Swanson & Gearen indorsed and gave Green a check or draft for the cash payment of $300.

For the purpose of this case it may be said that, had the note been made payable to Swanson & Gearen and had the action been brought by them instead of the loan and investment company, the oral testimony as to the transaction might have been received under the rule announced in Merchants Exchange Bank v. Luckow, 37 Minn. 542, 35 N. W. 434, and cases therein cited, and, if found true and sufficient to establish defendant's contention, would be a complete bar to a recovery of the balance unpaid on the note. Plaintiff's situation is not different. If the testimony of defendant is true as to what she related to Green, the plaintiff would be deemed in law to have had full notice of the conditions of the transaction. Swanson & Gearen, as individuals, indorsed the note before delivery. Green then turned it over to the Drovers State Bank, together with the $300 draft, and credit on the bank's books was given to Swanson & Gearen, subject to check, but it does not appear that the same was ever checked against. The plaintiff gave no consideration for the note so far as appears from the record.

If the agreement was as related by the defendant, and her testimony in relation thereto stands uncontradicted, if she made known to the plaintiff at the time of the giving of the note all the conditions thereof as she testified she did, and if she kept and performed all the conditions of the agreement, and the undisputed evidence is to that effect, then the note never became operative beyond the amount the cattle might bring in the fall. It was delivered and held in the nature of a pledge that the agreement would be performed. The note expresses only the method of payment in case the maker failed to keep her contract. The following cases are in point: Healy v. Young, 21 Minn. 389; Gammon v. Ganfield, 42 Minn. 368, 44 N. W. 125; Germania Bank of Minneapolis v. Osborne, 81 Minn. 272, 83 N. W. 1084. As stated in Giltner v. Quirk, 131 Minn. 472, 474, 155 N. W. 760, the evidence is admissible where the note was given as a part of a larger transaction, the facts

with reference to which give an independent right to defeat recovery. We hold that the evidence was competent and sufficient to justify the verdict. We find no reversible error in the charge of the court, nor in the conduct of counsel for defendant.

Affirmed.

JULIUS L. FRANSEN, AS ADMINISTRATOR OF THE ESTATE OF JOHN FRANSEN, DECEASED v. KELLOGG TOASTED CORN FLAKE COMPANY AND REX STANINGER.[1]

September 23, 1921.

No. 22,501.

Dismissal of action error.

The defendant Kellogg company furnished for the use of its codefendant Staninger, who was in its employ, an automobile to be used by him in advertising and selling its products. He was to drive it. The auto ran over and killed the plaintiff's intestate. It is *held* that the evidence was such as to authorize a finding by the jury that Staninger was driving the auto at the time in the business of the defendant, though there was no direct evidence to that effect, and that it was error to dismiss the action when the plaintiff rested.

Action in the district court for Ramsey county to recover $10,000 for the death of plaintiff's minor son. The answer alleged that any injury received by John Fransen arose from hazards which were open and obvious to him. The case was tried before Olin B. Lewis, J., who at the close of plaintiff's case granted defendant's motion to dismiss the action. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

Barton & Kinkead, for appellant.

Sexton, Mordaunt & Kennedy, for respondent.

[1]Reported in 184 N. W. 364.

DIBELL, J.

Action by the plaintiff, as administrator, to recover for the death of his minor son, who was run over and killed by an automobile in La Crosse, Wisconsin, on May 6, 1920. At the close of the case it was dismissed on the motion of the defendant Kellogg company. The defendant Rex Staninger answered, but did not appear at the trial. The plaintiff appeals from the order denying his motion for a new trial.

The trial court was of the view that there was not sufficient proof that Staninger was driving the car, nor that it was being driven in the business of the Kellogg company, and so dismissed the action. It is conceded that the evidence made the question whether the car which killed the boy was the car of the defendant for the jury.

Staninger was in the employ of the Kellogg company. His territory included La Crosse and two or three adjoining counties. He was advertising and taking orders for the Kellogg company products and was furnished advertising matter. He was furnished a Dodge commercial truck. It was lettered on both sides and on the back, according to the testimony of one of the company's sales managers, something like "Kellogg Toasted Corn Flake Company, Look for Signature." About 5:30 or 6 in the afternoon of May 6, 1920, a car, sufficiently identified by various witnesses as the Kellogg car, ran over and killed plaintiff's boy in one of the public streets. The police officers were notified at 6:30. They found the car parked at the hotel where Staninger was stopping. It was going in the general direction of the hotel when it ran over the boy. The officers found Staninger in his room about 6:45 washing. A drunken man was lying on the bed. The auto was not particularly examined that night, but the next day, on looking into it, advertising matter of the Kellogg company was found.

That the truck was being driven by Staninger and was being used in the company's business at the time, could have been fairly inferred by the jury. It was in business hours. The car was a business car. It was in La Crosse for Staninger's use in doing the company's business. He had charge of it. The company furnished no other car and had no other employe. No suggestion arises from the evidence that the car

was being used in other than the company's business or was being driven by an unauthorized person.

Of course the plaintiff cannot recover of the defendant, unless its auto was being used in its business at the time. Provo v. Conrad, 130 Minn. 412, 153 N. W. 753, and cases cited. But the evidence was such as to justify the jury in finding that the auto was being so used.

In some jurisdictions, and there are many late cases to that effect, it is held that proof of ownership makes a prima facie case of authorized use at the time. Other cases hold that the employment of the driver must be shown, and still others that use in the scope of the driver's employment is a fact to be proved. Notes L.R.A. 1918D, 924; 46 L.R.A.(N.S.) 1091. Babbitt, Motor Vehicles (2d ed.) § 827, et seq.; Huddy, Automobiles (5th ed.) § 673, et seq.; Berry, Automobiles, § 1047, et seq. And in passing it may be noted that it has been held, under varying circumstances, that the fact that the vehicle doing the injury was painted or lettered with the name of the defendant is evidence of ownership, or of ownership and operation, by the defendant at the time. Edgeworth v. Wood, 58 N. J. Law, 463, 33 Atl. 940; Norris v. Kohler, 41 N. Y. 42; Seaman v. Koehler, 122 N. Y. 646, 25 N. E. 353; Bosco v. Boston Store, 195 Ill. App. 133; O'Malley v. Public Ledger Co. 257 Pa. St. 17, 101 Atl. 94.

Our cases hold that proof that an automobile is for family use justifies an inference that the use at the time is an authorized use. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Johnson v. Evans, 141 Minn. 356, 170 N. W. 220, 2 A.L.R. 891. The auto which did the injury was a business auto, intended for use in the defendant's business in soliciting orders and distributing advertising matter, and was itself lettered for advertising purposes. We need not inquire as to the prima facie effect of proof of ownership, or of proof of ownership and the employment of the driver, as proof of the owner's use at the time, for the evidence before us responds to all tests of a prima facie case.

The case of Robinson v. Pence Automobile Co. 140 Minn. 332, 168 N. W. 10, relied upon by the defendant, is not controlling. There the questions of the ownership of the auto and the identity of the driver were for the jury. Upon the evidence, not at all resembling that in the

case at bar, it was held that it could not be inferred that the driver was engaged in the defendant's business.

We refrain from stating the testimony of the officers as to what Staninger said about the accident at the hotel. It may not have been competent evidence against the Kellogg company. Without it there was a prima facie case. The inferences to be drawn from it were inferences of fact and uncertain. Clearly it did not destroy the prima facie case made without it. An argument of fact might be made that it strengthened it, or that it weakened it.

Order reversed.

SCHOOL DISTRICT NO. 135 OF HENNEPIN COUNTY AND ANOTHER v. J. M. McCONNELL, AS STATE COMMISSIONER OF EDUCATION AND ANOTHER.[1]

September 22, 1921.

No. 22,511.

Consolidation of school districts — number of signatures to petition jurisdictional.

1. Under Laws 1917, c. 453, relating to the consolidation of school districts, the requirement that the petition be signed by a specified number of freeholders is jurisdictional.

Statute gives no right of appeal.

2. The right of appeal to the district court in a consolidation proceeding is statutory, and the statute cited does not give an appeal.

Amendment to statute not retroactive.

3. Chapter 441, Laws 1921, approved April 23, 1921, amending the 1917 act in several respects, and giving an appeal, does not operate retroactively, so as to deprive the plaintiffs of a cause of action for an injunction submitted on demurrer on April 19, 1921.

Invalid election — injunction.

4. In the absence of a right of appeal given by statute, and of any

[1]Reported in 184 N. W. 369.

other effective remedy, aggrieved parties may enjoin the making and filing of an order setting forth the result of the election, as required by the statute, the election being invalid because of an insufficient number of petitioners.

Action in the district court for Hennepin county to enjoin the state commissioner of education from making any order and the county auditor from filing any order relating to the consolidation of certain school districts. Defendants' demurrer to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action was sustained; their motion to strike out the complaint as sham was denied, Molyneaux, J. From the order sustaining the demurrer, plaintiffs appealed. Reversed.

Thomas Kneeland and *Ernest Malmberg,* for appellants.

Clifford L. Hilton, Attorney General, *Montreville J. Brown,* Assistant Attorney General, *Frank J. Williams,* Assistant County Attorney, and *Healy & La Du,* for respondents.

DIBELL, J.

This action was brought in Hennepin county to enjoin the state commissioner of education from making or filing an order with the county auditor setting forth the result of an election in a school district consolidation proceeding under Laws 1917, p. 757, c. 453, and enjoining the county auditor from taking any action relative to a consolidation.

The plaintiffs appeal from an order sustaining a demurrer to the complaint.

1. The election was held on December 7, 1920. It resulted in favor of the consolidation. The point urged against its validity is that the petition for a consolidation was not signed by so many as 100 legal voters as is required by the statute, and that therefore the proceeding was without jurisdiction. The requirement that the petition be signed by the number specified in the statute is jurisdictional. Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723; In re Consolidation of School Districts in Blue Earth County, 140 Minn. 475, 168 N. W. 552.

2. The defendants urge that the remedy of the plaintiffs is by appeal. No appeal was taken. The plaintiffs claim that no appeal is given.

The right of appeal rests on statute. In re Consolidated School District No. 41, Crow Wing County, 149 Minn. 418, 183 N. W. 979. There is no express provision for an appeal. The trial court was of the opinion that the statute is an enlargement of Laws 1915, p. 336, c. 238, section 4 of which provides for an appeal such as is provided in connection with the formation of school districts, and its further view was that thereby section 2676, relative to appeals, is applicable to the act of 1915, as apparently it is, and through it to the act of 1917.

Chapter 238, p. 336, Laws 1915, is the general consolidation act. This statute provides in section 4 for an appeal, as in the case of the formation of school districts, referring back to G. S. 1913, § 2676. Laws 1917, p. 621, c. 410, approved April 20, 1917, amends sections 4 and 5 of Laws 1915, pp. 337, 338, c. 238. It provides for an appeal. It does not affect sections 2 and 3, c. 238, pp. 336, 337, Laws 1915, which prescribe the conditions of a consolidation and the requirements of the petition. Laws 1917, p. 757, c. 453, the statute upon which this proceeding is based, approved on the same day as chapter 410, does not purport to amend a former statute. It refers in its title to the "consolidation of certain school districts in connection with villages and cities of the fourth class." It provides in sections 1, 2 and 3, for the conditions of consolidation, the character of the petition, the conduct of the election, and the certification of the result. It does not provide for an appeal. Laws 1919, p. 367, c. 342, amends "section 4, chapter 238, Laws 1915, as amended by section 1 of chapter 410, Laws 1917, relating to formation of consolidated school districts." It affects section 4 of chapter 238 as amended by section 1 of chapter 410. Section 4 as it appears in chapter 238, and as amended by chapter 410, provides for an appeal, and chapter 342 provides for an appeal in similar terms. Nowhere do we find Laws 1917, p. 757, c. 453, amended, prior to the submission of this action on demurrer, though, as noted later, it was amended shortly afterward.

We are unable to hold that the act of 1917 is so connected with the act of 1915 that the appeal for which the 1915 act provides is applicable to a proceeding under the 1917 act, nor can section 2676 be held to provide generally for appeals in later statutes relative to school district

consolidations. No right of appeal was given. There might well have been, and so there might have been in the Crow Wing case, but none was given.

3. The act of 1917 was amended by Laws 1921, p. 683, c. 441, section 3 of which gives an appeal such as is provided in connection with the formation of school districts.

The election was held on December 7, 1920. The demurrer to the complaint for an injunction is dated March 19, 1921. It was heard on April 19, and sustained on May 16, 1921. The appeal from the order was made on June 11, 1921. The amending act of 1921, p. 682, chapter 441, was approved on April 23, 1921.

The defendants, without abandoning their other claims, contend that the 1921 amendment gives the plaintiffs an appeal, and that therefore the complaint does not state a cause of action for an injunction. They claim that the amending statute is retroactive. They rely largely upon Oppegaard v. Board of Co. Commrs. of Renville County, 110 Minn. 300, 125 N. W. 504, which was followed in Sorknes v. Board of Co. Commrs. of Lac Qui Parle County, 131 Minn. 79, 154 N. W. 669.

It may be noted that the 1921 amendment changes the number required to institute the consolidation proceeding, and the vote necessary to carry the election. The situation arising under the 1921 act, which an appeal would review, is quite different from the situation before us for review under the 1917 act.

Our view is that the 1921 amendment does not affect the cause of action for an injunction, which existed and was pending and in which a demurrer had been argued and submitted when the amendment was adopted, by giving an appeal which made relief in equity unnecessary. The Oppegaard case did no more than sustain an appeal authorized by a subsequent statute. It did not affect a cause of action, pending and submitted to the court for decision, which was a valid one at the date of the later statute.

The contention that injunction will not lie because the plaintiffs had an adequate remedy by appeal is not sustained under the facts stated.

4. One of the plaintiffs is a taxpayer and elector in one of the affected districts. The other is an affected district. In some form there should

be given an opportunity for an adjudication of the validity of the consolidation proceeding. There is no right of contest. Relief cannot be had by appeal. The existence of a right of appeal might be an answer to the complaint. Certiorari was used without objection to determine the constitutional validity of the 1917 act in State v. Independent School District of Granite Falls, 143 Minn. 433, 174 N. W. 414. It does not seem that relief can be given in certiorari because of the defect claimed in this proceeding. State v. Clough, 64 Minn. 378, 67 N. W. 202; State v. Burnquist, 146 Minn. 460, 179 N. W. 371. Besides, the proceeding on its face shows no defect. If the districts were consolidated, relief might be had if the attorney general chose to challenge the consolidation by quo warranto. State v. Board of Co. Commrs. of Crow Wing County, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L.R.A. 745. And see Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040. But a consolidated school district is not organized. There remains the act of the commissioner, required by the statute, in making and filing the order.

It seems that injunction is a proper remedy. In Slingerland v. Norton, 59 Minn. 351, 61 N. W. 322, it was held that an elector and taxpayer had a remedy by injunction where the petition was insufficient through a defect not appearing on its face. This was in a county seat removal proceeding where the court has not been alert in finding remedies. It is true that in the Slingerland case proceedings had not gone so far as a vote. This fact is referred to by way of discussion in one of the opinions in State v. Board of Co. Commrs. of Crow Wing County, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L.R.A. 745. In Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040, where an injunction was refused, there was an election in favor of consolidating, the order of consolidation was made, officers were elected, bonds were authorized, and the district was doing business as a public corporation. Quo warranto and not injunction was there the remedy. We think, however, that the delay of the plaintiffs in this case until after the vote was taken is not fatal to the maintenance of the action.

Order reversed.

STATE v. WILLIAM McPADDEN.[1]

September 30, 1921.

No. 22,154.

Rape — evidence inadmissible.

1. In a prosecution for rape on a female under the age of consent, the fact of illicit relations with other men than defendant constitutes no defense, and evidence thereof is inadmissible either in justification or excuse.

Consent immaterial.

2. The law withholds from her the right of consent and her willingness or unwillingness is wholly immaterial.

How inference from pregnancy may be refuted.

3. In the case where pregnancy follows the act charged against defendant, he may show in refutation of any inference arising therefrom in corroboration of complainant, that other men had illicit relations with her at about the same time.

Offer of evidence too indefinite.

4. But an offer to show such relations both "before and after" the date charged against defendant is entirely too indefinite.

Verdict sustained by evidence.

5. The evidence made the question of defendant's guilt one of fact, and the verdict is sustained by sufficient competent evidence.

Indictment — allegation sufficient.

6. The allegation in the indictment that complainant was an unmarried female under the age of 18 years sufficiently negatives any marital relations between the parties.

Defendant was indicted by the grand jury of Carver county charged with the crime of carnal knowledge of a female child under 18 years of

[1]Reported in 184 N. W. 568.

age, tried in the district court for that county before Tifft, J., and a jury and found guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Affirmed.

P. W. Morrison, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham,* Assistant Attorney General, and *W. F. O'Dell,* County Attorney, for respondent.

BROWN, C. J.

Defendant was convicted of statutory rape upon a female under the age of 18 years and appealed from an order denying a new trial.

The questions raised by the assignments of error do not call for extended consideration. The record presents nothing not found in the ordinary case of this character, and a brief reference to the points raised in support of the appeal will suffice.

1. The evidence of the commission of the crime by defendant as given by complainant, though directly and flatly denied by him, presented an issue of fact for the jury. We discover from the record no fact or circumstance to discredit complainant as a matter of judicial inference, or reason for declaring as a matter of law that the jury erroneously gave credence to her testimony. The record in this respect is the usual one found in such cases, where there is a direct and irreconcilable conflict in the testimony of complainant and the accused. Their credibility was for the jury. And although counsel presented this feature of the case persuasively and with much earnestness in this court, in the belief of the innocence of his client, we are unable after full consideration of the record to concur in the contention that the verdict is unsupported by competent and reliable evidence. The case was one for the jury. They reported a verdict of guilty which the trial court approved, and there the matter must rest. State v. Johnson, 114 Minn. 493, 131 N. W. 629; State v. Bragdon, 136 Minn. 348, 162 N. W. 465; State v. Dieke, 144 Minn. 453, 175 N. W. 1000; State v. Rutledge, 142 Minn. 117, 171 N. W. 275.

2. The contention that the indictment is fatally defective in that it contains no allegation that complainant was not the wife of defendant is not sustained. The indictment does charge that she was an un-

married female under the age of 18 years. That conclusively negatives any marital relations between the parties.

3. The further point that there was error in the admission in evidence of prior and subsequent acts of intercourse between complainant and defendant, is disposed of by our prior decisions on the subject. The date of the offense as charged in the indictment was June 22, 1918. A prior act on the fourteenth of June, and a subsequent act on July 4, are the acts so claimed to have been erroneously admitted. The precise point was involved in State v. Schueller, 120 Minn. 26, 138 N. W. 937; State v. Roby, 128 Minn. 187, 150 N. W. 793, Ann. Cas. 1915D, 360, 171 N. W. 275; State v. Shtemme, 133 Minn. 184, 158 N. W. 48, and State v. Rutledge, 142 Minn. 117, 171 N. W. 275, and decided adversely to the contention here made. The South Dakota court in State v. Yeager, 41 S. D. 51, 168 N. W. 749, cited and relied upon by defendant, apparently followed the rule applied by some of the courts as to subsequent acts and rejected by this court in State v. Roby, supra. The rule must be taken as settled in this state that evidence of illicit acts with defendant prior and subsequent to the date of the charge relied upon by the state for conviction, is admissible where not too remote in point of time. State v. Rutledge, supra.

4. The fact of illicit relations with other men in a prosecution for statutory rape on a female under the age of consent is no defense, and evidence thereof is inadmissible either in justification or excuse. Such evidence can have no effect as tending to show consent, for the law withholds from her the right to consent. The statute was designed for the protection of young womanhood and he who violates its commands can find no comfort or relief by a showing of consent; her willingness or unwillingness to be debauched is wholly immaterial. The rule is well settled on this subject. State v. Henderson, 19 Idaho, 524, 114 Pac. 30; People v. Gray, 251 Ill. 431, 96 N. E. 268; Smith v. State, 90 Ark. 435, 119 S. W. 655; State v. Sibley, 131 Mo. 519, 33 S. W. 167; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360; State v. Rash, 27 S. D. 185, 130 N. W. 91, Ann. Cas. 1913D, 656; note to State v. Apley, 25 N. D. 298, 141 N. W. 740, in 48 L.R.A.(N.S.) 269; 22 R. C. L. 1211. Nor by the weight of authority is the evidence as a general

rule admissible as affecting the credibility of complainant. People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360; State v. Hammock, 18 Idaho, 424, 110 Pac. 169. There is authority to the contrary. State v. Apley, 25 N. D. 298, 141 N. W. 740, 48 L.R.A.(N.S.) 269. To what extent the subject may be inquired into on the trial by the usual method of impeachment of the complainant, we do not stop to consider. The question is not involved.

But where in such cases the state presents evidence in corroboration of the charge, showing that complainant became pregnant as the result of the act charged against defendant, defendant may, in refutation of the corroborating effect of the evidence so tendered (State v. Johnson, 114 Minn. 493, 131 N. W. 629), show that complainant had like relations with other men at about the date charged against him. Evidence of that kind, if believed by the jury, would wholly neutralize or destroy the effect of the state's showing on that feature of the case. However, in the case at bar defendant offered no evidence showing or tending to show such relations with other men at or about the date charged against him. On cross-examination complainant denied any such acts with other men, and there was no evidence to contradict her. The offer made by defendant to show such relations with other men both "before and after" the time charged against him was entirely too indefinite; the evidence to be admissible must be of acts having some relation in point of time to the pregnancy of complainant. In this respect defendant's offer fell short.

This covers the case and all that is necessary to say in disposing of the appeal. The evidence made the question of defendant's guilt one for the jury, the record presents no error, and the order appealed from must therefore be affirmed.

It is so ordered.

MARTHA A. FROMMELT v. THE TRAVELERS INSURANCE COMPANY.[1]

September 30, 1921.

No. 22,174.

Death by accident sustained by evidence.

1. The evidence in this case is sufficient to sustain a finding that the death of the insured resulted from accidental means.

Evidence not conclusive.

2. The evidence is not conclusive that the death was due in part to pre-existing disease.

Notice of death to insurer excused.

3. The policy covering the case required that, in event of accidental death, immediate notice must be given to the company. This means within a reasonable time. Almost immediately after death the soliciting agent who negotiated the policy procured it and surrendered it to the company, as plaintiff claims without her authority. It was never returned to her though later demanded. *Held*, this and other circumstances in the case excused plaintiff from giving notice of death.

Action in the district court for Hennepin county to recover on an accident insurance policy. The case was tried before Hale, J., who at the close of the evidence denied defendant's alternative motion for a directed verdict or dismissal, and a jury which returned a verdict for $8,237.50. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Dille, Hoke, Krause & Faegre and *L. N. Foster*, for appellant.

J. H. Sapiro and *Henry M. Farnam*, for respondent.

HALLAM, J.

This action was brought to recover on a policy of accident insurance issued to plaintiff's husband, Alfred Julius Frommelt. Plaintiff had a verdict. Defendant appeals.

[1]Reported in 184 N. W. 565.

1. The policy insured against loss resulting from "external, violent and accidental means." Defendant contends that the evidence fails to show that death resulted from such means. The short facts are as follows: About 1 a. m., January 16, 1918, deceased was, without premonition, taken sick at his home. He was suffering from a stricture of the urethra which prevented urination. Dr. Jones was called and arrived at 7 a. m. The evidence is in conflict, but there is competent evidence that, in passing a metal catheter through the urethra, Dr. Jones caused a severe lacertion. No relief was afforded. At 11 a. m. a trocar was passed into the bladder through an incision below the umbilicus and through this means the bladder was drained. At 3 p. m. another operation, styled the perineal operation, was performed. This consisted of an incision at the point of obstruction and the insertion of a drainage tube through the urethra into the bladder. Frommelt grew rapidly worse and died January 23.

The testimony for plaintiff consisted of her own testimony, giving the history of the case and the symptoms shown and the testimony of two doctors, Dewar and Quinby, who performed an autopsy five months later. The result of the autopsy was more fruitful than the layman would perhaps expect after the lapse of time. The two doctors gave the opinion that an infection set in in the urethra, worked up to the kidneys and caused death. If this infection was caused by the laceration from use of the catheter at 7 a. m. it may fairly be said to be the result of accident. If arising from one of the operations later in the day, it cannot be said to be accidental. Dr. Quinby gave the opinion that it was the result of the laceration. As basis in part for his opinion he indicated that it was probable from the symptoms and facts developed that infection set in very early, that there were indications that it had set in before the operation in the afternoon, and, the much greater probability of infection from a laceration caused by a catheter at a place within, where there had been no cleansing or sterilization, than by an operation with a knife in the hands of an experienced surgeon, and at a place where cleansing and sterilization were easy. We think the evidence sustains a finding of accidental death. See Lewis v. Ocean Accident & Guaranty Corp. 224 N. Y. 18, 120 N. E. 56, 7 A.L.R. 1129.

2. The policy covers only cases of loss through external, violent and accidental means "independently of all other causes," and by its terms excludes cases of death or other loss caused wholly or partly by bodily infirmity. Defendant contends that Dr. Dewar on the stand admitted that Frommelt's death was due partly to pre-existing disease, not to the stricture, but to a subacute nephritis. The court submitted this question to the jury in an instruction full and clear. The jury by their verdict decided this question adversely to defendant. We are of the opinion that their finding should not be disturbed. If Dr. Dewar's testimony contains the admission contended for, the admission of this one witness would not conclude plaintiff. But while some of Dr. Dewar's answers, at the close of a long cross-examination, contain this admission, when we take all his testimony together, while there is some confusion, we cannot be certain that Dr. Dewar intended an opinion that Frommelt had pre-existing nephritis. We are of the opinion that this question was properly submitted to the jury.

3. The policy requires that "in event of accidental death, immediate notice thereof must be given to the company." No formal notice was ever given to the company. The day after Frommelt died, Mr. Fust, the solicitor who solicited the policy, procured it from plaintiff and returned it to the company, and received from the company the unearned portion of the premium which he paid to plaintiff. His testimony is that he procured it and returned it in order to save that amount to plaintiff. Plaintiff's claim is that he obtained the policy without her knowledge, and, while admitting that he later handed her the money, said that it was while she was in the agony of grief over her husband's death and that she did not understand what it was for. On March 28, plaintiff's attorney demanded of Fust that he return the policy to plaintiff and Fust reported that fact to the company, but the policy was never returned.

The requirement of immediate notice is a requirement of notice within a reasonable time, and what is a reasonable time depends on the circumstances of the particular case. C. S. Brackett & Co. v. General A. F. & L. Assur. Corp. 140 Minn. 271, 167 N. W. 798. The fact that the policy was not in the possession of plaintiff but of the company is im-

portant, Curran v. National Life Ins. Co. 251 Pa. St. 420, 96 Atl. 1041; Solomon v. Continental Fire Ins. Co. 160 N. Y. 595, 55 N. E. 279, 46 L.R.A. 682, 73 Am. St. 707, for plaintiff could have no knowledge of its terms, and, without disparagement of her case, it may well be said that she probably did not realize at once that her husband's death was due to accident. Under such circumstances, we think the delay of plaintiff was excused.

After the demand for a return of the policy and the failure, tantamount to a refusal, to return it, we think the purpose of notice had been subserved and the failure to return the policy, implying the claim that it was no longer in force, absolved plaintiff of her obligation to further comply with its terms. Marcus v. National Council K. & L. of S. 127 Minn. 196, 149 N. W. 197; Dechter v. National Council K. & L. of S. 130 Minn. 329, 153 N. W. 742.

Order affirmed.

IN THE MATTER OF COUNTY DITCH NO. 33, MARSHALL COUNTY.

IN RE APPEAL OF RASMUS OEN.[1]

September 30, 1921.

No. 22,347.

Drain — trial in district court de novo.

1. The trial in the district court on appeal to determine benefits in a county ditch proceeding is a trial de novo, and the finding of the viewers in their report is not evidence.

Viewer is a competent witness.

2. The rule stated does not affect the competency of a viewer as a witness, and he may testify on appeal as to benefits.

Viewer's testimony may be attacked.

3. When the viewer becomes a witness, his testimony is subject to

[1]Reported in 184 N. W. 374.

the usual tests affecting its credibility and weight. He is not immune from attack.

Cross-examination of viewer.

4. When a viewer testifies that benefits to an appellant's lands are $20 per acre, it may be shown on cross-examination that the viewers, who were unanimous in their report, did not fix benefits to any land in the drainage district at so much as $20 per acre, or in excess of $4 per acre.

Same — scope of cross-examination discretionary with court.

5. It may be shown on the cross-examination of such witness that other specific tracts, said by him to be benefited in the same degree as the land of the appellant, were found in the report of the viewers to be benefited in amounts which were but a fraction of the benefits which he testified accrued to the appellant's land. The extent to which the cross-examination may go is largely discretionary with the trial court.

Rasmus Oen appealed to the district court for Marshall county from an order of the county board of that county determining the amount of benefits to his land from the construction of ditch No. 33 on the ground that the benefits determined by the county board were in excess of the actual benefit to his land. The appeal was heard before Grindeland, J., and a jury which returned a verdict fixing the benefits per acre. From an order denying his motion for a new trial, Rasmus Oen appealed. Reversed.

James Manahan, and *J. D. Hoogesteger,* for appellant.

A. N. Eckstrom, for respondent.

DIBELL, J.

Rasmus Oen appealed to the district court of Marshall county from the order of the county board determining the amount of benefits accruing to his land from the construction of county ditch number 33. The jury fixed the benefits to one forty at $6.25 per acre, to another at $5 per acre, and to another at $4.95 per acre. He appeals from an order of the district court denying his motion for a new trial.

The question is whether the court erred in refusing to permit appellant to show on the cross-examination of a viewer in the ditch proceeding, a witness for the county, that the amount of the benefits fixed for his

lands by the viewers was less than the benefits to which he testified, and that the benefits to certain other lands, which he testified received a like benefit, were less than those fixed by the viewers for his land.

1. The trial on appeal to the district court to ascertain benefits is a trial de novo. Rooney v. County of Stearns, 130 Minn. 176, 153 N. W. 858, and cases cited. The finding is not evidence; and the importance of keeping it from the jury has been emphasized. Dodge v. County of Martin, 119 Minn. 392, 138 N. W. 675; Cunningham v. County of Big Stone, 122 Minn. 392, 142 N. W. 802; Rooney v. County of Stearns, 130 Minn. 176, 153 N. W. 858. The same principle was long ago applied to a similar situation in condemnation proceedings. Sherman v. St. Paul, M. & M. Ry. Co. 30 Minn. 227, 15 N. W. 239; Northern Pac. Ry. Co. v. Duncan, 87 Minn. 91, 91 N. W. 271.

2. This rule does not affect the competency of the viewers as witnesses. Their testimony as to benefits does not infringe the rule, recognized in the three cases cited, that the assessments made by the viewers should not be used as evidence before the jury. Falkenhagen v. Counties of Yellow Medicine and Lac qui Parle, 144 Minn. 257, 175 N. W. 102. The viewers may be called by either party as witnesses.

3. Becoming witnesses they are not witnesses of a kind different from others. They are subject on cross-examination to the usual tests to determine their credibility and the weight of their testimony. They are not immune. A party cannot use them as witnesses and then insist that they be protected against a cross-examination which unfavorably affects their testimony.

4. One of the viewers testified that the benefits accruing to the appellant's land were $20 per acre. The appellant offered to prove on cross-examination that the viewers, who were unanimous in their report, did not fix the benefits to any land in the drainage area at so much as $20 per acre, or at an amount in excess of $4 per acre. The offer was rejected. This was error.

Viewers are required to take an oath to perform their duties. It is their duty to fix benefits. The assessments for actual cost of construction are based proportionately on benefits. The viewer having testified that benefits were $20 per acre, it was proper to show that when

performing his official duties he did not see benefits in excess of $4 per acre. Make the illustration complete. Assume that a viewer testifies on behalf of the landowner that his property was not benefited or that the benefits were nominal, should it be held that the county could not show on cross-examination that he found the benefits substantial when he made his view and report? The injustice of a rule not permitting cross-examination is apparent. The jurors naturally infer, if they think of it at all, that his testimony corresponds with his finding as viewer. On the trial on appeal the law does not want the finding of the viewers as evidence. It is that finding which is being attacked and is under review. If a viewer is called by either party, he is, like other witnesses, subject to cross-examination, and inquiry may be made of him of things he said or did at other times materially and directly affecting the credit or weight of his testimony. That it calls for the judgment which he expressed when a viewer, does not make it improper.

5. On cross-examination a viewer, giving testimony for the county on question of benefits, testified that three quarters separately owned were benefited to the same extent per acre as the land owned by the appellant. The appellant offered to show as a part of the cross-examination, by reference to the report of the viewers, that one of these quarters was assessed at $380, another at $540, and the other at $440. The proof was rejected. This was error.

It is every day practice to ask an expert witness, testifying upon the value of lands, as to the value of nearby tracts, or of sales of similar property, or of the value which he has put upon lands of like character, or about comparative values. The same principle is operative in the situation before us.

In a sense this is inquiring into collateral matters. The extent to which the examination may go is largely discretionary. The trial court is charged with the conduct of the trial, and, mindful of the rule that cross-examination of an expert witness on value to determine credibility and weight should be somewhat free, and of the other rule that the extent of cross-examination, especially when directed to matters in their nature collateral, is within its fair discretion, it should not permit the cross-examination unduly to prolong the trial or to continue when

it ceases to be useful or becomes unfair. It may exercise its fair discretion. But such cross-examination is competent.

Order reversed.

QUINN, J. (dissenting).

I dissent. In my opinion the viewers' report, under the rule adhered to by this court in the cases cited in the majority opinion, was properly excluded. As stated, a viewer when called as a witness upon a trial before a court and jury in a drainage proceeding, as other witnesses, is subject to cross-examination. In the instant case the viewers' report was offered for the manifest purpose of showing the amount of assessments upon several tracts of land not involved in the trial. The cross-examination was in no way restricted except as to the offer of the report. Only the assessments on demandants' lands were under consideration. The question of benefits in such proceedings is largely a matter of opinion and must be arrived at by the viewers, oftentimes by compromising and arriving as nearly as possible at a correct amount, and the viewers' report does not necessarily represent the exact opinion of any one viewer, but rather the result arrived at by the three in equalizing the assessments on all the lands benefited by the system. A jury is called to assess benefits for the particular lands of demandants, while it is the duty of the viewers to determine and equalize the assessments on the lands benefited by the entire system.

H. E. BERGH v. F. J. STANEK.[1]

September 30, 1921.

No. 22,426.

Broker — commission not earned when terms of mortgage are not those authorized.

A broker authorized to sell for $7,000 in cash, $5,400 in five years, and $10,000 in ten years, all at 6 per cent, does not become entitled to his

[1]Reported in 184 N. W. 371.

commission by tendering a contract which requires his principal to give a deed and take mortgages for the deferred instalments and which provides that such instalments shall be payable on or before the specified dates and that they shall not bear interest until nine months after the date of the contract, unless such contract is accepted by the principal. An offer to accept, qualified by a condition not acceded to, operates as a rejection.

Action in the district court for Swift county to recover $2,600 as broker's commission on a sale of land. The case was tried before Daly, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

George D. Smith, for appellant.

Hudson & Hudson, for respondent.

TAYLOR, C.

Plaintiff is a real estate broker. Defendant is the owner of 320 acres of land in Swift county. The complaint contains allegations to the effect that defendant employed plaintiff to sell the land and agreed to allow plaintiff as his commission whatever amount he sold it for over and above $70 per acre; that plaintiff procured and produced a purchaser ready and willing to buy the land for $25,000 on terms satisfactory to defendant; that defendant refused to make the sale or perform the contract on his part, and asks judgment for the sum of $2,600 as compensation for plaintiff's services. The answer puts in issue all allegations of the complaint except as admitted or qualified, and then sets forth that one Nels Amlie held a prior contract for the purchase of the land; that defendant authorized plaintiff to sell the land for $70 per acre net to defendant, but with an express stipulation that no binding contract should be made nor liability of any kind be imposed on defendant, unless the prior contract should be terminated in proceedings then contemplated for canceling it, and that the prior contract has not been canceled but remains in full force and effect. The answer further sets forth, in effect, that the contract of sale negotiated by plaintiff was not upon the terms and conditions prescribed by defendant. The reply

denied any knowledge of the existence of the prior contract until after the transactions set forth in the complaint.

The trial court made findings of fact and conclusions of law, and rendered judgment for plaintiff. Defendant appeals. There is no case or bill of exceptions and the only question is whether the findings in connection with the pleadings sustain the judgment.

The court found as a fact that plaintiff had negotiated his sale before he had any notice or knowledge of the prior contract made by defendant with Amlie, and, as a result of this finding, the defense predicated upon the alleged agreement in respect to that contract has been abandoned so far as this appeal is concerned.

Plaintiff is not entitled to his commission, however, unless he produced a purchaser ready, able and willing to buy on the terms authorized by defendant. McDonald v. Smith, 99 Minn. 42, 108 N. W. 290. 1 Dunnell, Minn. Dig. § 1142.

The pleadings do not set forth the terms on which plaintiff was authorized to negotiate a sale, nor the terms of the sale which plaintiff in fact negotiated. The terms authorized are found in a letter incorporated in the findings of fact. The terms of the sale negotiated by plaintiff are found in a contract tendered to defendant which is also incorporated in the findings of fact. On May 21, 1919, plaintiff wrote defendant that a certain unnamed party had made a proposition "that he would pay $6,500 to $7,000 cash, but he wanted the balance to run, which would be $15,400 as follows: $5,400 in five years, and $10,000 in ten years, all at six per cent, figuring a cash payment of $7,000, $2,000 now and $5,000 March 1st, 1920." Plaintiff asked defendant to wire whether he would accept the proposition and added:

"I understand I will have to get my commission above the $70 per acre mark, also understand that you want a payment of $2,000 earnest money." On May 23, 1919, defendant wired: "You may close as per your letter of May 21st, 1919."

On May 29, 1919, plaintiff mailed to defendant for his signature two copies of a contract dated May 24, 1919, and signed by G. R. Watson, the proposed purchaser, and inclosed therewith a draft for $2,000. The proposed contract acknowledged the receipt of $6,000 as earnest money

and part payment for the land, and stated that defendant agreed to sell and convey the land by warranty deed for $25,000 on the following terms:

"Six thousand and no/100 dollars in hand paid as above and $4,000 on June 24th, or as soon thereafter as warranty deed and clear title can be given. On June 24th, 1919, said vendor will accept as part payment on said above described land a mortgage for $5,000 payable on or before March 1st, 1925, with interest at the rate of 6% per annum payable annually from and after March 1st, 1920, and will in addition accept as part payment for said land a second real estate mortgage for the sum of $10,000 payable on or before March 1st, 1930, with interest at the rate of 6% per annum payable annually from and after March 1st, 1920. It is expressly understood and agreed that said G. R. Watson shall not pay any interest until from and after March 1st, 1920, and it is also expressly understood and agreed that he shall be entitled to 6% interest on the $10,000 he pays down from the time that deed is issued to him and until March 1st, 1920, that is, the land is purchased on March 1st, 1920, terms, with settlement on day that deed is given by said vendor and mortgage accepted.

"It is also agreed and understood that said vendor shall pay the 1919 taxes.

"Said purchaser shall have the right to go on and plow said above described lands as soon as the crops are taken off." There was an indorsement on the back of the contract also signed by Watson changing the above terms in certain particulars not of moment here.

Defendant refused to execute the contract, and on June 3, 1919, returned both contract and draft in a letter in which he said:

"I just read the contracts, and I wish to say I cannot accept as they are. In the first place the buyer was to assume the mortgage and in the second place they do not carry the clause as per my letter of April 15, 1919.

"You see that the other contract has not been cleared up, our attorneys are still working on it, and [it] may be cleared any time, so if you hold the contracts until everything is cleared, then we will proceed with them."

Further correspondence followed, but did not result in any agreement and plaintiff brought this suit for his commission.

The terms of the contract tendered by plaintiff were a wide departure from the terms stated in plaintiff's letter of May 21, and authorized by defendant. We call attention to some of the more important differences. The contract required the giving of a deed on the payment of $10,000 and the taking of mortgages for the deferred payments. The authorized terms contained no such provision. The contract provided that the purchaser should pay interest on the deferred payments only from and after March 1, 1920, while the authorized terms contemplated interest on such payments from the date of the making of the contract. The contract provided that the purchaser should be allowed interest until March 1, 1920, on payments required to be made by him before that date, while the authorized terms contained no such provision. The contract provided that one of the deferred payments should be payable on or before five years and the other on or before ten years, while the authorized terms required the first of these payments to be payable in five years and the second in ten years. The terms of the contract were materially and substantially different from those authorized, and plaintiff did not become entitled to his commission by tendering such a contract. Hamlin v. Schulte, 31 Minn. 486, 18 N. W. 415; Jackson v. Badger, 35 Minn. 52, 26 N. W. 908; Hornsby v. Hause, 35 Minn. 369, 29 N. W. 119; Marble v. Bang, 54 Minn. 277, 35 N. W. 1131; Fairchild v. Cunningham, 84 Minn. 521, 88 N. W. 15; Clark v. Dayton, 87 Minn. 454, 92 N. W. 327; Rutherford v. Selover, 87 Minn. 495, 92 N. W. 413; Quist v. Goodfellow, 99 Minn. 509, 110 N. W. 65, 8 L.R.A. (N.S.) 153, 9 Ann. Cas. 431.

Procuring a purchaser ready and willing to buy on terms different from those prescribed by the owner, does not entitle the broker to a commission, unless such different terms are accepted and agreed to by the owner. 4 R. C. L. 303, § 46. Defendant did not accept the contract tendered to him. His proposition to the effect that if plaintiff would hold the contract "until everything is clear" he would then proceed with it, was not acceded to, and did not amount to an acceptance of the contract as proposed. Hamlin v. Wistar, 31 Minn. 418, 18 N. W.

145; Langellier v. Schaefer, 36 Minn. 361, 31 N. W. 690; Baker v. Brundage, 131 Minn. 299, 154 N. W. 1086. An acceptance qualified by a condition not acceded to, operates as a rejection of the proposition as made.

Judgment reversed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. BENSON PRODUCE COMPANY.[1]

September 30, 1921.

No. 22,438.

Limitation of action — complaint fatally defective.

A complaint which shows that the time limited by statute for bringing the action had expired before the action was begun, without showing the existence of facts which will avoid the operation of the statute, fails to state a cause of action.

Action in the district court for Swift county to recover $171.50 balance due for freight and demurrage on a carload of potatoes. Judgment by default was entered in favor of plaintiff. From the judgment entered purusant to the order for judgment, defendant appealed. Reversed.

John I. Davis, for appellant.

Hudson & Hudson, for respondent.

TAYLOR, C.

Defendant appeals from a judgment entered against it by default, and contends that the complaint shows on its face that the alleged cause of action was barred by the statute of limitations.

The action is for a balance of $171.50 claimed to be due for freight and demurrage on a carload of potatoes shipped over plaintiff's railway from Minneapolis, Minnesota, to Chicago, Illinois. It appears from the complaint that on or about May 29, 1913, the potatoes were delivered to the Great Northern Railway Company at Bellingham, Minnesota, to be transported to Minneapolis, and there to be held for further shipping

[1]Reported in 184 N. W. 373.

directions by defendant; that they were duly carried to Minneapolis, where, by defendant's direction, they were delivered to plaintiff to be transported to Chicago; that plaintiff duly carried them to Chicago and duly notified defendant of their arrival at destination and requested defendant to direct what disposition should be made of them; that defendant failed to receive them or give any directions for disposing of them; that plaintiff was obliged to hold them in its possession for ten days or more; that they were of a perishable nature and had become spoiled and in bad condition and of little or no value; that plaintiff was compelled to, and did, sell them after notice to defendant; that, after applying the proceeds of the sale on plaintiff's charges, a balance in the sum of $171.50 remained due plaintiff, and that plaintiff demanded this sum from defendant about May 18, 1918.

The complaint does not give the date on which the potatoes arrived at Chicago, nor the date on which they were sold, but, as they were delivered to the carrier at Bellingham or on about May 29, 1913, and were duly transported from that point to Minneapolis and from Minneapolis to Chicago, and apparently were disposed of in the manner in which perishable freight in bad condition is usually disposed of where the owner, after notice, fails to accept it or to give any directions for disposing of it, we think it sufficiently appears that the sale must have taken place and plaintiff's cause of action must have accrued more than six years before April 7, 1920, the date on which this action was begun.

Plaintiff does not seriously contend to the contrary, but seeks to sustain its judgment on the ground that the complaint does not conclusively show that the cause of action was barred. In support of this contention it cites Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693. This decision, after stating that this court has repeatedly held "that a complaint showing upon its face that the statute had run is demurrable, or may be objected to after judgment, on the ground that it does not state a cause of action," further states that the objection "will not be allowed, unless the complaint conclusively shows that the action is barred," and that it "would be difficult to imagine a case where that fact would 'clearly' or 'conclusively' appear on the face of the complaint, unless it expressly negatived all the exceptions which would prevent the statute from running."

That this last statement was obiter is pointed out in Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734, in which the prior cases in this state are considered and analyzed, and in which the rule is established that where the complaint clearly shows that "the time allowed by the statute for bringing suit expired before the suit was brought, and nc fact is set forth avoiding the operation of the statute, the complaint is demurrable."

This rule was approved and followed in Riley v. Mankato L. & T. Co. 133 Minn. 289, 158 N. W. 391. Following the rule as explained and defined in the Ferrier case, we hold that plaintiff's complaint fails to state a cause of action, for the reason that it shows on its face that the action was not brought until more than six years had elapsed after the cause of action had accrued and fails to state any facts which will avoid the operation of the statute.

Judgment reversed.

STATE EX REL. WILLIAM JAFFA v. HENRY CREPEAU, CHIEF OF POLICE OF CITY OF ST. PAUL, AND OTHERS.

MINNESOTA STATE BOARD OF PAROLE, APPELLANT.[1]

September 30, 1921.

No. 22,626.

Conditional discharge of prisoner.

1. The board of parole of this state may grant a prisoner a conditional discharge, and, if the condition fails, the discharge is inoperative. A discharge on condition that the prisoner is taken into custody by the authorities of another state becomes void on the authorities of such state declining to take him into custody.

Paroled prisoner may be ordered returned without hearing.

2. Under our statute the board of parole may order the return of a paroled prisoner without a hearing. The statute is constitutional.

Upon the relation of William Jaffa the district court for Ramsey county granted its writ of habeas corpus directed to Henry Crepeau,

[1]Reported in 184 N. W. 567.

Chief of Police of the city of St. Paul and the members of the State Board of Parole. From an order discharging relator from custody and restraining respondents from further interference with the person of relator, Kelly, J., respondents appealed. Reversed and writ discharged.

Clifford L. Hilton, Attorney General, and *Egbert S. Oakley,* Deputy Attorney General, for appellants.

A. J. Hertz, for relator.

HALLAM, J.

1. Relator was adjudged guilty of grand larceny in the second degree and was sentenced to the state reformatory at St. Cloud to be imprisoned until discharged by due course of law or by competent authority. The limit of punishment under the law is imprisonment for five years. Relator commenced his term of service January 27, 1919. Early in 1921 the board of parole received advices that relator was charged with crime committed in Illinois, and that the Illinois authorities wanted to secure his arrest upon his discharge in Minnesota. On April 26 the board of parole, considering his case, took the following action: "Discharge authorized on condition that the Illinois authorities get him." Soon thereafter it developed that the Illinois charge had been dropped and that the Illinois authorities did not want him. Thereupon the board of parole again considered the case and on May 9 took this action: "Discharge to Illinois authorities rescinded and parole authorized." Relator was thereupon released on parole.

On July 26, 1921, the board of parole, again considering his case, took this action: "Parole rescinded and warrant for arrest issued." Under this warrant relator is now held.

We construe the action of April 26 as a conditional discharge. This is just what it purports to be, a discharge on condition that relator should be taken into custody by the Illinois authorities. Since the Illinois authorities did not take him into custody the condition failed and it was inoperative.

The learned district judge was of the opinion that the condition was void and that, the condition failing, the discharge became absolute. We cannot agree that the condition was void. Pardons and paroles upon

condition are quite generally recognized as valid when authorized by statute and even in the absence of statute, if such condition is made a part of the discharge. State v. Wolfer, 53 Minn. 135, 54 N. W. 1065, 19 L.R.A. 783, 39 Am. St. 582; Kennedy's Case, 135 Mass. 48; Arthur v. Craig, 48 Iowa, 264, 30 Am. Rep. 395. There is nothing in the statutes that forbids and we see no reason of public policy for holding such a condition void. Had the board granted only a parole under the usual regulations, relator could not have left the state and a discharge and not a parole was the proper procedure in event relator was to be remanded to the authorities of another state.

2. Relator contends that the prison authorities have no power to cause his arrest and return to prison without according him a hearing on the question whether he had in fact violated the terms of his parole. The statute provides: "Such convicts while on parole shall remain in the legal custody and under the control of the state board of parole, subject at any time to be returned to the state prison or state reformatory, and the written order of said board, certified by the warden or superintendent of the state reformatory, shall be a sufficient warrant to any officer to retake and return to actual custody any such convict." G. S. 1913, § 9273.

This statute gives to the board the power to order the return of a paroled prisoner in the exercise of their judgment and discretion. No trial or hearing is provided for. The board in causing the arrest and demanding the return of relator accordingly acted within the law, unless this statute is for some reason unconstitutional. We know of no constitutional provision that it violates. The propriety of such legislation is impliedly recognized in State v. Wolfer, supra, and is sustained in other states, and it is generally held that there is no infringement of any constitutional guaranty of the personal rights or liberty of the convict. Fuller v. State, 122 Ala. 32, 26 South. 146, 45 L.R.A. 502, 82 Am. St. 1; Kennedy's Case, 135 Mass. 48; Owen v. Smith, 89 Neb. 596, 131 N. W. 914; Spencer v. Kees, 47 Wash. 276, 91 Pac. 963; Woodward v. Murdock, 124 Ind. 439, 24 N. E. 1047; State v. Stephenson, 69 Kan. 405, 76 Pac. 905, 105 Am. St. 171, 2 Ann. Cas. 841; State v. Page, 60 Kan. 664, 57 Pac. 514; State v. Peters, 43 Oh. St. 629,

4 N. E. 81; Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L.R.A. 109.

The theory is that a parole granted under such a statute, is granted, not as a matter of right, but of grace, and that the convict, by accepting this form of parole, is bound by the conditions imposed by the statute under which it is granted.

There are decisions in other states holding similar legislation wholly or in part invalid as an infringement of particular constitutional provisions vesting the pardoning power in the Governor of the state. People v. Moore, 62 Mich. 496, 29 N. W. 80; State Board of Corrections, 16 Utah, 478, 52 Pac. 1090; In re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L.R.A. 658; People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L.R.A. 285.

Our Constitution creates a board of pardons "whose powers and duties shall be defined and regulated by law." Const. Minn. art. 5, par. 4. We think this provision permits the legislation here in question. (See also People v. Cook, 147 Mich. 127, 110 N. W. 514.)

Order reversed and writ discharged.

JOHN SCANLON v. JOHN WANLESS AND ANOTHER. HENRY E. WEBSTER, APPELLANT.[1]

October 7, 1921.

No. 22,342.

Judgment notwithstanding verdict.

1. Even though the evidence was insufficient to justify a verdict for plaintiff, defendant was not entitled to judgment notwithstanding the verdict if it appeared probable to the trial court that what was lacking can be supplied at another trial.

Exercise of judicial discretion.

2. The trial court exercises judicial discretion in determining the probability of the existence of the evidence needed.

[1]Reported in 184 N. W. 570.

Action in the district court for St. Louis county to recover $17,300 for malpractice. The case was tried before Fesler, J., who when plaintiff rested granted a motion to dismiss the action as to defendant Wanless and denied a similar motion by defendant Webster, and at the close of the testimony denied defendant Webster's motion for a directed verdict on the ground that plaintiff had failed to establish any negligence on his part or any causal connection between any of the acts of defendant and the final injury from which plaintiff suffered, and a jury which returned a verdict for $1,850. Defendant Webster's motion for judgment notwithstanding the verdict was denied and his motion for a new trial was granted because of errors of law. From the order denying his motion for judgment notwithstanding the verdict and granting a new trial, defendant appealed. Affirmed.

Baldwin, Baldwin, Holmes & Mayall, for appellant.

Samuelson, McHugh & O'Donnell, for respondent.

HOLT, J.

Plaintiff recovered a verdict for malpractice against this defendant. The latter moved in the alternative for judgment notwithstanding the verdict or a new trial. A new trial was awarded for errors of law solely, and judgment non obstante was denied. The defendant appeals.

Because a hypothetical question put to plaintiff's medical expert was not so framed as to correctly state the facts respecting appellant's treatment and plaintiff's condition and situation, a new trial was granted.

A brief statement of the facts are these: Plaintiff, over 50 years old, while working on a farm a short distance from Cramer, Minnesota, was kicked by a horse and his heel bone fractured. His employer brought him to appellant for treatment. The foot was put in splints for a week or ten days, then in a cast, which was kept on for some six or seven weeks. After the cast had been on for about three weeks, plaintiff, with the approval of appellant, went back to his employer. Plaintiff says he was directed to remove the cast in three or four weeks. Appellant testified that he advised that it be kept on during the journey and removed as soon as plaintiff reached his destination. Plaintiff claims there were sores about the ankle when the cast was removed;

that he came down to Duluth to see appellant who, after examining the foot and prescribing the use of a salve, sent him back. A couple of months thereafter plaintiff became very ill with pneumonia. His employer again brought him to appellant at Duluth for treatment. He recovered, but it was then found that, near the ankle of the injured foot, gangrene had so developed that an amputation of the leg a few inches above the knee was imperative. In general terms the complaint alleged that appellant negligently and unskilfully treated the fracture, and that as a result he "contracted pneumonia and a septic condition of the leg ensued."

The evidence of improper or negligent treatment came from Dr. Wunder, plaintiff's medical expert, and was simply to this effect, that in his opinion the treatment given by appellant was not proper, and that the gangrene, being local, was due to poor circulation and infection. There was no expert testimony that any treatment could have saved the leg or prevented the gangrene. The medical testimony adduced by appellant was that the gangrene was wholly due to poor circulation because of the advanced arteriosclerosis then existing in the leg, and could not have been caused by the abrasions which plaintiff claims were on the ankle when the cast was taken off. There was no expert testimony in contradiction thereof, except that Dr. Wunder considered the gangrene due in part to infection. But appellant, by a number of competent doctors, also proved that the gangrene which appeared on plaintiff's ankle, and because of which the amputation became necessary, was dry gangrene and hence could not have come from infection. There was no testimony in contradiction thereof. This is not a case where the jury from their own knowledge and experience could determine what caused the gangrene, or what treatment, if any, a physician exercising ordinary care and skill could have used that might have prevented its formation and saved the leg. As the record now stands the evidence must be held insufficient to support a verdict.

But the conclusion reached does not entitle to a reversal of the order denying the motion for judgment non obstante. The rule is that, "even where there was a total absence of evidence on some material point, but where it appeared probable that the party had a good cause of action

or defense, and that the defect in the evidence could be supplied on another trial," judgment will not be ordered notwithstanding the verdict. Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958. On this branch of the motion the order of the trial court must be regarded as, in some measure, discretionary. The only difficulty we have is whether it can be said that the court below was right in holding, as he must have done, that it appeared probable that the defect in the evidence could be supplied at another trial. The probability in the mind of the court of the existence of such evidence might be found in the fact that plaintiff's attorneys, perhaps inadvertently, made no attempt to elicit the opinion of Dr. Wunder as to whether proper treatment could have prevented gangrene, or as to whether the gangrene which developed, being dry gangrene, could have come from the abrasions caused by the cast, or any neglect in their treatment. There is no claim that amputation, when made, was not the proper treatment, or that the result was not as good as might be expected, considering the advanced sclerosis of the artery in that leg.

We are unable to hold that it did not appear probable to the learned trial court that the lack of medical expert testimony to make out a case for malpractice can be supplied upon another trial.

The order is affirmed.

IN RE ESTATE OF WILLIAM BREWSTER, DECEASED. SARAH SEILER v. CORA P. HENLE AND OTHERS.[1]

October 7, 1921.

No. 22,352.

Will — undue influence — capacity of testator.

1. In a will contest the evidence is examined and *held* to sustain the findings of the trial court to the effect that the will in dispute was not induced or brought about by undue influence exerted by those to whom the bulk of testator's property was given, and that the testator was

[1]Reported in 184 N. W. 564.

of sound and disposing mind when the will was formally drawn and executed by him.

Exclusion of evidence.

2. There was no prejudicial error in the exclusion of certain evidence tendered by contestants on the trial.

Cora Starring Henle petitioned the probate court for Hennepin county for the allowance of the last will and testament of her uncle, William Brewster, deceased. Mathilda Harrison, Nettie Harrison, Ada Starring and Sarah Seiler, heirs at law and nieces of testator, filed objections to the allowance of the will. From the order of the probate court admitting the will to probate, Dahl, J., the contestants appealed to the district court for that county. The appeal was heard before Waite, J., who affirmed the order of the probate court. From an order denying her motion for a new trial, Sarah Seiler appealed. Affirmed.

George R. Smith and *H. Stanley Hanson,* for appellant.

Cary & Kaminer, Elmer W. Gray and *John O. Loeffler,* for respondents.

BROWN, C. J.

William Brewster, late of Hennepin county, died therein on the twenty-third day of July, 1919, leaving what purported to be his last will and testament, by which he disposed of his entire property and effects. He left surviving as heirs and next of kin five nieces and two nephews, daughters and sons of his deceased sister, and they in different shares were made sole legatees under the will. The will was duly presented to the probate court for allowance. On the day appointed for hearing thereon certain of the nieces, who had not shared as well as others under the will, interposed objections to the allowance thereof on the grounds, as alleged and stated by them: (1) That the will had been revoked by the testator prior to his death; (2) that the will was procured by the undue influence of one of the nieces and was not testator's free act and deed, and (3) that at the time the will was made testator was suffering from bodily infirmities and was mentally incompetent to know and understand the nature of his act, therefore, that

the will was not in law valid or of legal effect. The issues thus raised were brought to trial before the probate court, and after consideration of the evidence resolved against contestants and the will sustained. An appeal was taken to the district court where, after a trial before the court without a jury, a like result followed. Contestants then appealed from an order of that court denying a new trial.

The points made under the assignments of error do not require extended discussion. There was no showing of mental incapacity on the part of the testator, and the evidence presented to the trial court justified and in our view thereof fully sustains the finding that the will was not the result of or brought about by the undue influence of any of the legatees who received the bulk of the property. We need not review the evidence; it would serve no useful purpose. It is sufficient that we have read it with the result stated. The principal question raised on the appeal is whether there was reversible error in the rulings of the trial court in the admission and exclusion of evidence. We answer it in the negative.

Testator was some 59 years of age at the time the will was executed, and he continued in life until he was 65. He owned both real and personal property of the value of $40,000, or more. The evidence shows that for some 20 years prior to his death a woman by the name of Johnson served him in the capacity of housekeeper during all that time. He had no wife or children. His sister, the mother of the nieces and nephews named as legatees, died a number of years prior to the date of the will in question, and after her passing there seems to have grown up among her children much ill will and hatred, one toward the other, a condition that remained up to the time of the trial of this case. One of the favored legatees, Cora Henle, apparently was intense in her feelings towards her sisters, and the claim is that by methods of various kinds she sought to poison and prejudice the mind of testator against them, and that she in fact succeeded. It was sought to show by certain correspondence between the sisters, or some of them, and by letters written by Cora, this intense and violent family disturbance, and disruption of the natural love and affection usually found in the family circle. The evidence was excluded, and we think properly so. The letters were written, and the

correspondence offered for the purpose took place, subsequent to the date of the will, and simply emphasized the existence of the strained family relations, a fact that was fully before the court. There was no error in this respect.

There was an attempt also to introduce in evidence a conversation had between the niece Cora and testator's housekeeper, which took place it is claimed in the presence and hearing of testator, and which tended to indicate a purpose on the part of Cora to place one of her sisters in an unfavorable light before testator. It was excluded. The court might have admitted the evidence without error, but the subject matter and character of the conversation is not of such significance or importance as a factor in the direction claimed as to justify a new trial of the action. It seems that one of the nieces had sent to testator a jar of cherry preserves, and, upon discovery thereof in the house, and hearing from whence it came, Cora admonished the housekeeper not to let testator eat thereof, for she believed the same had been poisoned by her sister. Whether testator heard the conversation is left in doubt by the evidence. He was in the room, but was reading a newspaper, took no part therein, and apparently paid no attention to what was under discussion by the housekeeper and Cora. The fact sought to be brought out, corroborated what already appeared, and disclosed the extreme hatred Cora had for the particular sister. There being a serious doubt whether testator heard or was influenced thereby in making his will, the ruling should not require a new trial.

Testator seems to have been a man of too strong a personal character to be influenced by the incident, conceding that he may have heard the conversation. He was in sound mental and physical condition when the will was made, and verbally directed the terms and provisions to be inserted therein. The will was drawn by a reputable attorney at his office in Minneapolis, and no other person accompanied testator; in fact it does not appear that any of the nieces or nephews knew when the will was so formally made and executed, or that they at any time made any suggestions to testator as to what he should do with his property, and the unfriendly relations between the nieces appear as about the only

basis for the charge that he was influenced by those favorably treated by the will in discriminating against the others.

There may be another item or two of rejected evidence not necessary to specially mention, which could have been admitted without error. But our examination thereof in connection with the whole record leads to the conclusion that the matters tendered were not of special importance or significance, and that the exclusion thereof was not prejudicial. The result would not have been different had the evidence been admitted. 2 Dunnell, Minn. Dig. §§ 7181, 7182.

What has been said covers the case. The evidence sustains the findings of the trial court, the record presents no reversible error, and the order appealed from must be affirmed.

It is so ordered.

W. S. KEANE v. BERT BUTNER.[1]

October 7, 1921.

No. 22,388.

Negligence of automobile driver — verdict sustained — exclusion of evidence.

1. In an action for damages suffered by plaintiff as the result of a collision between a vehicle driven by him on a public highway and an automobile driven by defendant, it is *held* that the evidence supports the verdict, and that the record presents no error in the rulings of the trial court excluding certain evidence offered by defendant, or in the charge of the court to the jury.

Following the traveled track of a public road not negligence.

2. Where the traveled track of a public road is to one side of the center thereof, it is not negligence as a matter of law to drive in such track, though it be upon the left side of the road to the particular driver.

Duty of drivers of approaching vehicles.

3. In that situation it is incumbent upon drivers of meeting vehicles,

[1]Reported in 184 N. W. 571.

when practicable, to turn to the right so that free passage may be had for each.

Action in the district court for Traverse county to recover $237 for injuries to plaintiff's property in a collision with defendant's automobile. The answer denied that defendant attempted to drive to the left and to pass plaintiff on that side and alleged that plaintiff carelessly and negligently drove his team of horses on the south or left side of the highway and into defendant's car. The case was tried before Flaherty, J., who when plaintiff rested denied defendant's motion to dismiss the action, and a jury which returned a verdict for $113.50. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Lewis E. Jones, for appellant.

Murphy & Anderson, for respondent.

BROWN, C. J.

Plaintiff was driving along a public highway with his team of horses and buggy. It was in the night time and quite dark. Defendant at the same time was driving his automobile on the same road, coming from the opposite direction. There was a collision, the automobile struck one of the horses, inflicting an injury, a broken leg, which made it necessary to shoot and kill the animal to end its suffering. This action was subsequently brought to recover the value of the horse, the ground thereof being the alleged negligent operation of defendant's automobile. At the trial the plaintiff had a verdict for the value of the horse, and defendant appealed from an order denying a new trial.

The assignments of error present the question whether there was error in the rulings of the court on the admission of evidence, whether the court erred in its instructions to the jury, and, finally, whether the evidence supports the verdict. All of which we have attentively considered and find no sufficient reason for interference with the order denying a new trial.

The evidence is amply sufficient to justify the conclusion that the accident was caused by the negligence of defendant in the operation of his automobile, and that plaintiff was free from contributory negligence.

The case is not unusual in its facts and the evidence need not be discussed. A careful reading thereof leads to the conclusion stated and there we may dismiss the subject. There was no prejudicial error in excluding the evidence tendered by defendant that a witness repaired to the scene of the accident the following morning and there discovered broken glass on the road at a point claimed by defendant, disputed by plaintiff, as the place of the accident. The issue as to the collision, as to what part in the road it occurred, was fully threshed out by the several witnesses, and the claims of the respective parties clearly laid before the jury, and it is quite apparent that, had the particular item of evidence been admitted, the verdict of the jury would have been the same. Its exclusion was not prejudicial, therefore not ground for a new trial. 2 Dunnell, Minn. Dig. §§ 7181, 7182. There was no departure on the trial from the issues presented by the pleadings. There is usually a dispute as to the precise place and manner of accidents of this kind when the evidence comes in, but that does not create a departure from the pleaded issues.

It appears that the traveled track of the particular road was to one side of the center, a situation often found in our graded highways. Plaintiff was driving his team in that track, which as to him lay on the left side, while defendant was approaching also in the same track. In that situation no conclusion of negligence can follow as a matter of law against the persons thus driving. There was evidence that defendant, in approaching, turned abruptly to the left instead of the right as the law requires. The verity of that evidence was for the jury. The court properly left the question to the jury, saying to them, that in a situation of the kind stated those thus meeting on the road should, when practicable, turn to the right far enough to permit the passage of both vehicles. The instructions were in harmony with G. S. 1913, § 2552. It was claimed by defendant that the traveled track was within two feet of the ditch extending along the road, and that he could not turn out in that direction. The charge of the court properly covered that feature of the case, and expressly stated that he was not required by the law of the road or otherwise to run his automobile into the ditch; all that was required of him was to turn to the right if it was practicable to do so.

The charge of the learned trial judge, taken as a whole, though a little long, was a clear and fair presentation of the case to the jury and we discover no reasonable cause for complaint by defendant.

The further contention is made that the jury, in arriving at a verdict, resorted to the plan, sometimes claimed to be resorted to by juries, of taking the amount deemed fair by each, dividing the total thereof by 12, the number of jurors, and reporting the result as the damages awarded. The record does not sustain the point. The affidavits of the jurors to thus impeach the verdict were not admissible. 2 Dunnell, Minn. Dig. § 7109; McDonald v. Pless, 238 U. S. 264, 35 Sup. Ct. 783, 59 L. ed. 1300.

The evidence sustains the verdict and the record presents no grounds for a new trial, and the order denying defendant's motion for a new trial is therefore affirmed.

K. B. A. CHAIR COMPANY, INC. v. A. DAVIS, N. HELFMAN AND OTHERS.

DAVIS CHAIR COMPANY, APPELLANT.[1]

October 7, 1921.

No. 22,397.

Sale — finding sustained.

The evidence in this case is sufficient to sustain the finding that plaintiff made a sale of certain chairs to defendants.

Action in the municipal court of Minneapolis against the partners composing the Davis Chair Company to recover $590.35, the price of certain chairs. The answer set up a counterclaim for $62.40. The case was tried before C. L. Smith, J., who made findings and ordered judgment in favor of plaintiff for $562.85. From an order denying its motion for a new trial, Davis Chair Company appealed. Affirmed.

[1]Reported in 184 N. W. 673.

N. Rivkin, George R. Smith and *H. Stanley Hanson,* for appellant.
Stevens & Stevens, for respondent.

HALLAM, J.

This is an action to recover the price of certain chairs alleged to have been sold by plaintiff to defendants. The court found for plaintiff. Defendants appealed. The chairs were delivered. Plaintiff claims they were delivered pursuant to an agreement of sale. Defendants deny any such agreement. The question submitted to us is whether the evidence on the part of plaintiff is sufficient to sustain the finding that there was a sale. The evidence is for the most part that of plaintiff's general manager. His testimony is disconnected and at times confusing, but he did testify to a negotiation with two of defendants at different times, the effect of which was to make out a contract of sale. He is corroborated by the fact that a receipt was given for the chairs, unsigned though it was, and he testified that this was written out under the direction of one of defendants, and delivered to him by the same defendant. There is the further fact that the chairs were never returned and plaintiff's witness testified that defendants never asked plaintiff to take them back before this suit was started. Considering all the evidence in plaintiff's behalf, we think it is sufficient to sustain the court's finding.

Order affirmed.

HELEN A. BUTCH v. C. H. SHAVER.[1]

October 7, 1921.

No. 22,505.

Workmen's Compensation Act — loss of eye.

1. Where an employe sustains a personal injury by accident arising out of and in the course of her employment which irrecoverably destroys the sight of her right eye, though with extra artificial means she

[1]Reported in 184 N. W. 572.

may have fair vision, she is entitled to compensation as for the loss of the eye, under the provisions of section 8207, G. S. 1913, as amended by chapter 442, Laws of Minnesota for 1919.

Same — accident arising from employment.

2. In this proceeding, under the Workmen's Compensation Act, the testimony supports the finding that the injury complained of arose out of and in the course of respondent's employment.

Upon the relation of C. H. Shaver the supreme court granted its writ of certiorari directed to the district court for Hennepin county and the Honorable Frank M. Nye, one of the judges thereof, to review the proceedings in that court under the Workmen's Compensation Act brought by Helen A. Butch as employe, against relator as employer. Affirmed.

Cray & Eaton, for relator.

A. A. Tenner, for respondent.

QUINN, J.

Certiorari to review a judgment of the district court of Hennepin county, decreeing that respondent is entitled to judgment against relator for compensation under the Minnesota Workmen's Compensation Act, at the rate of $12.52 per week for 100 weeks, beginning July 3, 1920, with interest, and $182.55 as expenses, and costs and disbursements.

It appears that the respondent, Helen A. Butch, a married woman 16 years of age, entered into a contract of employment with the relator at Minneapolis as a kitchen servant in a restaurant which he operated at the railroad station in Spooner, Wisconsin. Respondent's working hours were from 11 o'clock in the morning until 7 p. m. during the serving of meals upon the arrival of trains. Her husband was employed at the same place. The employes, including respondent, were permitted to use the laundry in the basement of a hotel operated by relator, for doing their personal laundry. For her services respondent received $40 per month and board and room, aggregating $80 per month. Relator furnished the laundry fully equipped with tubs, water, stove, clothes line, soap, etc., for use by his employes.

Upon the trial respondent introduced testimony tending to show in

effect that on June 26 while engaged in the course of her employment she was directed by the management of the restaurant to wash the dish towels; that accordingly she went to the laundry in the basement of the hotel and started to wash the towels and at the same time included some of the clothes of herself and husband; that when she had finished washing she undertook to replenish the fire in the laundry stove, and that, while in the act of breaking a stick of wood for the fire, a splinter flew into her right eye inflicting the injury complained of. The respondent also testified that she was required to and did wash dishes, scrub floors, prepare vegetables, wash dish towels and do other kinds of work about the restaurant.

Dr. Wood, an eye specialist, was the only doctor examined upon the trial. He testified, in effect, that he first met and examined respondent on July 2; that at that time there was a small wound on the cornea of the right eye, with marked inflammation; that the wound was leaking fluid and the lens back of the cornea was opaque, cataractous, shutting off the complete view so she had only shadows in the eye; that the lens was out of place and there was a wound in the lens itself, letting the fluid into the lens making it opaque, a traumatic cataract; that respondent was then placed in a hospital and on July 8 he removed the lens, which was absolutely necessary; that respondent had no vision at all in that eye, so when one would shake his hand in front of the eye she would see the shadow; that the lens shut off the light and vision from the back of the eye; that when he removed the lens there was still a little splinter there that came out with it; that on account of the absence of the lens she is unable to use the right eye for the purpose of seeing; that the eye will not improve at all, though with extra artificial means she will have fair vision, but without glasses the eye is practically useless; that the traumatic condition is one of the common causes of such conditions.

The trial court found as facts, that the respondent while in the course of her employment was engaged in washing clothes in defendant's laundry, and, while in the act of breaking a piece of kindling to keep the fire alive in the laundry stove, a splinter flew and struck her right eye with great force and violence and penetrated the same, "thus and there-

by irrecoverably destroying the sight of plaintiff's right eye." This finding is supported by the testimony.

It is contended on behalf of relator that respondent is not entitled to compensation as for the loss of an eye; that the lens does not furnish sight but accommodation to distance; that she could see with the injured eye to some extent after the removal of the lens and with properly fitted glasses would have a two-thirds vision. We are unable to concur with this proposition.

Section 8207, G, S. 1913, as amended by chapter 442, p. 520, Laws 1919, contains a schedule of compensation for injuries sustained. It provides "for the loss of an eye, sixty-six and two-thirds per centum of daily wages during one hundred weeks. * * * In all cases of permanent partial disability within the foregoing schedule, it shall be considered that the permanent loss of the use of a member shall be equivalent to and draw the same compensation as the loss of that member." The foregoing provisions apply and we hold that compensation so fixed and determined will not be diminished by reason of the fact that the disability may in a measure be overcome by artificial means.

There was ample testimony to support the finding that the injury complained of arose out of and in the course of respondent's employment.

Affirmed.

ALICE McNAMEE, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF CLYDE McNAMEE, DECEASED v. WALKER D. HINES ET AL.[1]

October 14, 1921.

No. 22,242.

Railway — clearance between tracks in switch yard.

1. The railway company constructed its switching yard 20 years ago with the clearance between tracks usual at that time. Switching yards

[1]Reported in 184 N. W. 675.

recently constructed usually have a greater clearance. If the yard was reasonably safe, continuing to use it without rearranging the tracks so as to provide a greater clearance, is not negligence, unless it appears that such yards are no longer in common use or that changed conditions require a greater clearance.

Proximate cause of injury.

2. To entitle plaintiff to recover, the evidence must show a causal connection between the negligence charged and the injury suffered.

Inference unwarranted.

3. The evidence does not justify an inference that the accident resulted from the negligence charged rather than from some other cause.

Action in district court for Pipestone county to recover $50,000. The case was tried before Nelson, J., who at the close of the testimony denied defendant's motion for a directed verdict on the ground that it appeared there was no negligence on the part of defendant; that the accident occurred solely by reason of contributory negligence of plaintiff's decedent; that as a matter of law plaintiff's decedent assumed the risk of his injury and that even though it were found there was negligence in the premises with respect to construction and maintenance of tracks, it appeared as a matter of law that such negligence was not and could not be the proximate cause of the injury, and a jury which returned a verdict for $5,000. Plaintiff's motion for a new trial was denied. From the judgment in favor of defendant, plaintiff appealed. Affirmed.

Davis & Michel, for appellant.

O'Brien, Stone, Horn & Stringer, for respondent.

TAYLOR, C.

Alleging that the death of her intestate, Clyde McNamee, resulted from the negligence of defendant, plaintiff sued for damages. The trial court submitted the case to the jury, who returned a verdict for plaintiff. Thereafter the court directed judgment for defendant notwithstanding the verdict and plaintiff appealed from the judgment so entered. The only question presented by the appeal is whether the evidence was sufficient to sustain the verdict.

Clyde McNamee was foreman of a switching crew in the yards of the Rock Island Railway Company at Council Bluffs, Iowa. The tracks in this yard extend east and west, and connect with a lead track in the usual manner at their western ends. The tracks are numbered from the south toward the north and the distance between the north rail of track 5 and the south rail of track 6 is six feet and six inches. An incoming freight train had been placed on track 6 and the crew of which McNamee was foreman were engaged in "breaking" up this train on the night of September 2, 1919. The crew consisted of an engineer and fireman who operated the engine, and Mr. McNamee and two helpers, W. A. Cone and J. A. Maher. After transferring a dozen or more cars from track 6 to other tracks, they "kicked" two refrigerator cars from the lead track east on track 5. As soon as these cars had cleared the lead track, the engine proceeded east on track 6, passing the refrigerator cars which were moving slowly on track 5, and coupled onto the cars remaining on track 6. When they reached these cars McNamee and Cone, who had ridden to this point on the engine, got off on the south side of track 6. The number of the various tracks to which these cars were to be transferred had been marked on the cars with chalk by the yardmaster. McNamee directed Cone to take down these numbers as the cars passed him and signaled the engineer to back up. In this movement the engine fronted east and moved backward in pulling the cars toward the west lead track. Shortly after the train began backing up, the two refrigerator cars drifting east on track 5 ran over Mr. McNamee, killing him instantly.

Two grounds of negligence are alleged: That the space between the tracks was not sufficient to afford a safe place for employes to stand while cars were passing over both tracks, and that there were "low joints" on track 5 which caused cars passing over it to sway or lurch from side to side.

This yard was laid out and constructed some 20 years ago. Plaintiff's evidence is to the effect that in yards constructed at that time the usual, or standard, clearance between tracks was six feet and six inches as in this yard, but that in yards constructed recently the usual clearance is seven feet and six inches. The duty of a railway company to exercise

reasonable care to furnish a safe place for its employes to work, does not require it to rearrange the tracks in its switching yards so as to conform to the latest methods of minimizing danger, in the absence of a statute requiring the adoption of such methods. If the arrangement is such that the yard is reasonably safe under existing conditions and such as is common in such yards, it is sufficient under the rules governing such matters. Clay v. Chicago, M. & St. P. Ry. Co. 104 Minn. 1, 115 N. W. 949; Dolge v. Northern Pacific Ry. Co. 107 Minn. 242, 119 N. W. 1066, 26 L.R.A.(N.S.) 600; and see McMillan v. Northern Pacific Ry. Co. 125 Minn. 7, 145 N. W. 613. We think that defendant it not chargeable with negligence in continuing to use a yard in which the clearance between tracks was only six feet and six inches, unless it also appears that such yards are no longer in common use or that changed conditions require a greater clearance. Plaintiff scarcely refers to this claim of negligence, but insists that the other claim was established. The witness Cone and the witness Ricketts testified that there were "low joints" in track 5. While the witnesses for defendant vigorously denied the existence of such "low joints," the evidence was sufficient to make this question a question for the jury, if it were material.

The theory of plaintiff is that McNamee was between tracks 5 and 6, and that one of the refrigerator cars swayed or lurched against him in such a manner that he fell beneath the wheels of the rear refrigerator car. The theory of defendant is that McNamee was between the rails of track 5, and while there was struck and run over by the refrigerator cars. Plaintiff concedes that no recovery can be had if McNamee was not between tracks 5 and 6 but between the rails of track 5 at the time of the accident, and relies on the testimony of Cone as justifying the jury in finding that he was between tracks 5 and 6.

The yardmaster testified that a few minutes after the accident, when he was seeking information for the purpose of sending a report to the office, Cone stated that McNamee was between the rails of track 5 and that Cone repeated this statement to him the following morning. On the following afternoon Cone made a written statement to the claim agent in which he again said that McNamee was between the rails of

track 5. At the coroner's inquest, which was held 12 days after the accident, Cone was called as a witness, and there testified that McNamee was between the rails of track 5. At the present trial Cone testified first that McNamee was between tracks 5 and 6; later that he, Cone, was facing toward the east taking down the numbers of the cars on track 6 as they passed and did not see McNamee at the time of the accident as McNamee was behind him, but that he had seen McNamee between tracks 5 and 6 a few moments before. Cone further testified that he had taken the number of the first car on track 6 and was taking the number of the second, when one of the refrigerator cars on track 5 lurched against him, turning him around, and that he then saw McNamee's lantern come out from between the tracks of the rear refrigerator car as if thrown, which was the first knowledge that he had of the accident, and further testified that he did not see the refrigerator cars and did not know that they were still moving until they lurched against him.

Mr. McNamee was found beneath the rear trucks of the rear refrigerator car, lying flat on his back crosswise of track 5—his feet near the south rail and his head and shoulders projecting beyond the north rail. The wheels had passed over his chest. All the witnesses who saw him in this position state that he had not been dragged along the track. The cars were drifting and must have been moving very slowly when they reached McNamee, for they came to a stop while the rear car was still over him. Consequently, according to plaintiff's witness Roe, who was the only witness who testified concerning this matter, they could not have had sufficient momentum at this point to cause them to lurch suddenly or violently when passing over a low joint. If Mr. McNamee was between the cars on track 5 and those on track 6, we are unable to conceive how the slow swaying of the cars on track 5, conceding that they did not lurch against him, could have caused him to fall in such a manner as to place his body in the position in which it was found, especially in view of the fact that the body had not been dragged along the track.

All the facts are much more consistent with the theory that when he was struck he was in front of the on-coming cars. It is true that plain-

tiff may establish her case by circumstantial evidence, but such evidence must be something more than merely consistent with her theory. It must tend to show a causal connection between the negligence charged and the injury suffered. It must justify an inference that the injury resulted from such negligence rather than from some other cause. Unless it justifies such an inference it will not sustain a verdict for damages. Rogers v. Minneapolis & St. L. Ry. Co. 99 Minn. 34, 108 N. W. 868; Moores v. Northern Pac. Ry. Co. 108 Minn. 100, 121 N. W. 392; Bruckman v. Chicago, St. P. M. & O. Ry. Co. 110 Minn. 308, 125 N. W. 263; La Pray v. Lavoris Chemical Co. 117 Minn. 152, 134 N. W. 313; Murphy v. Twin City Taxicab Co. 122 Minn. 363, 142 N. W. 716; Mitton v. Cargill Elev. Co. 124 Minn. 65, 144 N. W. 434; Crandall v. Chicago G. W. Ry. Co. 127 Minn. 498, 150 N. W. 165. As said in Kludzinski v. Great Northern Ry. Co. 130 Minn. 222, 153 N. W. 529:

"The burden of proof is upon the plaintiff to prove that some negligent act of defendant caused the death of deceased. It is not incumbent on the defendant to show how the accident happened. If the cause of its happening is not established, the defendant is entitled to prevail. The proof must establish causal connection beyond the point of conjecture. It must show more than a possibility of injury from defendant's acts."

The evidence furnishes no basis for an inference that the accident happened in the manner claimed by plaintiff rather than in the manner claimed by defendant, and the trial court was correct in holding that plaintiff had failed to establish a cause of action.

Judgment affirmed.

ARTHUR MINER v. JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, ET AL. GEORGE C. STILES, INTERVENER.[1]

October 14, 1921.

No. 22,353.

Complaint — not construed to allege false cause of action.

1. The evidence was not such as to require a finding that an amended complaint in a personal injury case had been so framed as to set forth falsely the circumstances under which plaintiff had been injured, with intent to fabricate a cause of action.

Attorney's lien — computation of attorney's percentage.

2. The amount received by the plaintiff upon a settlement of the case, made without the knowledge of his attorney, may be taken as the basis for the computation of the attorney's agreed percentage of the recovery, in a proceeding to establish his lien upon the cause of action and recover from the defendant the amount he was entitled to receive under his contract of employment.

Substitution of defendant after lien has been fixed.

3. The agent of the President under the Transportation Act of February 28, 1920, may be substituted for the original defendant in such a proceeding after the attorney's lien has been established, where such agent was joined as a party to the proceeding and appeared and answered therein.

In an action in the district court for Hennepin county to recover damages for personal injuries, George C. Stiles filed his complaint in intervention to recover $4,000 attorney fees. The matter was heard by Molyneaux, J., who made findings and ordered judgment in favor of intervener Stiles, for $4,460. From an order denying his motion for a new trial, the substituted defendant appealed. Affirmed.

Barrows, Stewart & Metcalf, for appellant.

F. M. Miner, for respondent.

[1]Reported in 184 N. W. 673.

LEES, C.

While employed as a freight conductor in the state of Wyoming by the defendant railroad company the plaintiff, Arthur Miner, fell from his train and was severely injured. About two weeks later one Benon, representing the intervener, George C. Stiles, obtained from Miner a signed statement, in which he said he was going over his train from one car of lumber to another and went down between the cars, and that there were no grab irons except at the bottom of the car. At the same time Miner signed a contract employing Stiles as his attorney, to bring an action for damages against the railroad company, agreeing to pay him a sum equal to one-third of the amount received either by suit or settlement. Benon immediately telephoned to Stiles, informing him of the retainer and of the facts of the case, and the latter at once commenced an action, sending a copy of the complaint to Miner with a letter asking him to examine it and inclosing a check for $100 as a personal loan. He wrote that he could not make out from what Benon had said whether plaintiff had fallen from the end of a gondola car or from the end of the car next to it, and asked him to tell him in his own way how he fell. He added that if necessary he would amend the complaint to set up the facts correctly. To this Miner replied that there had been a mistake as the letter was "not like it should be at all," and returned the check and asked Stiles not to do anything more until he notified him. About two weeks later Benon obtained another statement from Miner, in which he said he was on a bad order box car, which was loaded on a flat car and was going down the side of the box car; that the grab iron was driven into the side of the car, and in making a step he swung around the end of the car and fell in between the cars. At the same time he either gave or exhibited to Benon a letter from a fellow employe, named Fee, stating that Fee had checked the train and found the grab irons bent against the body of the "penalty defects" car body.

In the original complaint it was alleged that plaintiff fell while climbing upon the end of a gondola car, because the top grab iron on the car was missing. In the amended complaint, served after Miner made his second statement, it was alleged that he fell while climbing down the side of a box car, because the two lowest hand-holds in the ladder on the

car were bent in against the side of the car. The railroad company answered, denying liability, and several months thereafter made a settlement with Miner, paying him $12,234 for a release of his claim. The settlement was made while the case was on the trial calendar of the Hennepin county district court, was made without Stiles' knowledge, and immediately thereafter, Miner, who had been living in Minneapolis while his case was pending, left that city and returned to his home in Wyoming without paying Stiles anything for his services.

On discovering these facts Stiles obtained leave to intervene in the action and filed a complaint therein setting up his contract of employment, the bringing of the action in pursuance thereof, the settlement made by Miner, his failure to pay him for his services, and claimed a lien upon the cause of action by virtue of chapter 98, p. 121, Laws 1917, for one-third of the sum Miner had received, and demanded judgment for that amount against the railroad company and also against John Barton Payne as agent of the President under the Transportation Act of February 28, 1920. Though the latter was named by the intervener as a defendant, so far as the record shows no order of substitution had been or ever was entered by the court. The defendants answered separately, but by the same attorneys. Among other defenses both alleged that Miner fell from a gondola car and that in that respect his original complaint was true; that his amended complaint was prepared by intervener after he learned that there was another car in the train which had a defective ladder, and that the amendment was made with full knowledge that the accident did not occur on that account. The agent of the President also alleged that the intervener had not been employed to sue and had not sued him. At the trial the principal issue was whether the intervener had caused plaintiff's complaint to be amended with knowledge that the cause of action finally pleaded was fabricated. There was a sharp conflict in the evidence bearing on this issue. The trial court decided it in favor of the intervener, awarding him the amount claimed, together with certain expenditures made for plaintiff's benefit and the President's agent has appealed from an order denying his motion for a new trial.

1. We have carefully considered the evidence relating to the issue

already mentioned. It cannot be reconciled. According to the testimony of Miner and his wife, corroborated to some extent by the written evidence, Benon induced Miner to attempt to perpetrate a fraud by manufacturing evidence which would fit in with the theory that he fell from the box car on which Fee found the defective ladder. According to Benon and two other witnesses, the facts were as alleged in the amended complaint, and Stiles was mistaken in setting them out as he did in the original complaint. A clear cut issue of fact was presented to the trial court, and we cannot hold that there was not sufficient evidence to sustain a finding in favor of the intervener.

2. Citing Lawler v. Dunn, 145 Minn. 281, 176 N. W. 989, appellant insists that there could be no recovery without proof of the reasonable value of intervener's services, and that he could not rely on his contract with plaintiff to establish the amount of his recovery. In Davis v. Great North. Ry. Co. 128 Minn. 354, 151 N. W. 128, it was held that the amount of a settlement of a pending action for damages may be taken as the basis for the computation of the attorney's agreed per cent of the recovery, if the settlement was made in good faith and without a purpose to defraud the attorney and in Southworth v. Rosendahl, 133 Minn. 447, 158 N. W. 717, 3 A.L.R. 468, the rule announced in the Davis case was referred to with approval. In Wildung v. Security M. Co. 143 Minn. 251, 173 N. W. 429, and in Scharmann v. Union Pac. Ry. Co. 144 Minn. 290, 175 N. W. 554, it was assumed that the rule applied to such cases as the present one. The Lawler case does not lay down a different rule and is not at all in point. It merely decided that an attorney discharged without cause could recover only the reasonable value of the services he had rendered to his client.

3. It seems to be conceded that the agent of the President has never been substituted for the railroad company as defendant pursuant to section 206 of the Transportation Act of 1920. Intervener's claim is one which is properly payable out of funds appropriated under the provisions of that act, and we see no reason why an order of substitution may not be entered nunc pro tunc, if applied for in the court below. The agent of the President voluntarily appeared and answered, and the merits of the controversy with the intervener have been considered and

determined by the trial court, so that the objection that there has been no substitution is merely formal.

The order appealed from is affirmed and the cause remanded to the district court with directions to entertain a motion for the substitution of the agent of the President as defendant in the action.

F. E. MURPHY v. J. AMBROSE CASEY, ALIAS AMBROSE CASEY.[1]

October 14, 1921.

No. 22,424.

Insurance — rights of insured subordinate to those of beneficiary.

1. Under G. S. 1913, § 3465, a policy of insurance effected in favor of another is exempt from the claims of creditors of the insured, and his rights and interests under the contract are as to creditors seeking to acquire them subordinate to those of the beneficiary.

Insured's option to demand cash value of policy — attachment by creditor.

2. The right of option reserved to the insured to surrender the policy and demand the then cash value thereof, to which the beneficiary can make no valid objection, cannot be attached or levied upon by his creditor, so long as the right of the beneficiary to the ultimate payment of the policy at the insured's death remains in force and effect.

Attachment of insured's contingent interest.

3. Neither can the contingent interest of the insured, dependent upon whether he outlives the beneficiary and the policy becomes payable to his estate, be attached by the creditor during the life of, or before, the rights of the beneficiary have lawfully been terminated.

Action in the district court for Aitkin county to subject defendant's interest in certain life insurance policies to the payment of his debts. Defendant's demurrer to the complaint on the grounds that the facts stated were not sufficient to constitute a cause of action and that it appeared on the face of the complaint that there was a defect of parties

[1]Reported in 184 N. W. 783.

defendant was sustained by Stanton, J. From the judgment entered in favor of defendant, plaintiff appealed. Affirmed.

Washburn, Bailey & Mitchell, for appellant.

L. T. Mahaney and *Thomas D. O'Brien,* for respondent.

BROWN, C. J.

On October 16, 1918, plaintiff duly recovered a judgment against defendant in the district court of St. Louis county for the sum of $11,344.34. Execution was issued thereon on December 9, 1918, and subsequently returned unsatisfied. On May 2, 1919, a second execution was issued under which the sheriff levied upon an alleged interest of the judgment debtor in and to certain policies of life insurance issued to him by the Northwestern Mutual Life Insurance Company on September 3, 1910. This action, in the form of a creditor's bill, was brought in aid of the execution and to subject defendant's interest in the policies to the payment of the same. All the facts upon which the claim is based are set forth in the complaint to which defendant interposed a general demurrer. The demurrer was sustained and judgment thereon rendered for defendant, from which plaintiff appealed.

The policies of insurance were issued to defendant on his application long prior to the judgment made the basis of the action, and payable at the insured's death to his mother, Emma E. Casey, as sole beneficiary, with the reserved right on his part as the insured, to change the beneficiary at any time. The policies are all of the 20 year payment plan, and each contains a cash surrender option, which the insured may exercise, and by a surrender thereof at the time and manner therein provided demand and be entitled to receive from the insurance company the stipulated surrender value of each; in the exercise of which the beneficiary has no restraining voice. The policies also provide that, in the event the beneficiary shall not be living at the death of the insured, the amounts due thereon at his death shall become payable to his heirs, executors, administrators and assignees, no other beneficiary having been designated prior to his death.

It is contended by plaintiff that the cash surrender option given by the policies to defendant, in the exercise of which the named beneficiary

has no voice, and also the contingent interest in and to the amounts payable in the event the beneficiary dies before the insured, are property rights in defendant which are available to creditors, and that the trial court erred in not so holding.

Both these contentions are answered adversely to plaintiff by section 3465, G. S. 1913, by which insurance policies of this character, having a designated beneficiary, are exempt from the claims of creditors of the insured. The statute provides that "whenever any insurance is effected in favor of another, the beneficiary shall be entitled to its proceeds against the creditors and representatives of the person effecting the same. All premiums paid for insurance in fraud of creditors * * * shall inure to their benefit from the proceeds of the policy, if the company be specifically notified" of the claim before payment.

No claim is here made on the theory that the premiums paid on these policies were in fraud of creditors, and rights arising under the latter clause of the statute are not involved, the sole claim presented being the asserted right to resort to the interests of the insured in the cash surrender option and his alleged contingent right in the event he shall survive the beneficiary.

Our conclusion, after full consideration of the questions involved, is that the statute is one of exemption, and that the policies in question, so long as they remain without change of beneficiary by death or otherwise, are exempt from the claims of creditors, and the interests of the insured here sought to be reached are not available to them. To grant the relief on either ground asserted by plaintiff, would, in our view of the matter, wholly destroy the intent of the statute and deprive beneficiaries in such cases of the protection the legislature intended to secure to them.

While it is true that the insured may cash in his policy without regard to the wishes of the beneficiary, that reserved right, since the insurance was effected and taken out for the benefit of the latter, to give force and effect to the statute, must, as to creditors seeking to exercise it in the place and stead of the insured, be deemed and held subordinate to the rights of the beneficiary. There are no sound reasons either in morals or in equity and good conscience why the creditor, to the detri-

ment of the beneficiary, should be given the right and privilege of the insured in such cases. No credit is extended to the insured on the faith of the insurance, for all persons dealing with him are bound to know the law, and that money to become due thereon when payable to a third person is exempt from their claims. The statute is wise in its purpose, securing as it does after the death of the insured pecuniary aid and assistance to the beneficiary, usually some one who is dependent upon the insured for support, and should not be frustrated or impaired by opening the door to those who have no just or equitable claim to the money.

The authorities sustain this view of the question. In re Johnson, 176 Fed. 591, involved the construction of our statute in Federal bankruptcy proceedings, and the conclusion stated was there applied. The court followed the rule of other Federal courts, and held that the insurance policy there involved did not pass to the trustee in bankruptcy, for the reason that it was exempt under our statute to the beneficiary. In re Pfaffinger, 164 Fed. 526; Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. ed. 1018; Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. ed. 771. The case of Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. ed. 143, is not an authority to the contrary and does not support plaintiff's case.

What has been said and the conclusion reached apply equally to both of plaintiff's contentions. To hold with plaintiff on either point would result in the destruction of rights the legislature intended to secure to the beneficiaries in such insurance contracts. To extend to the creditor the option to surrender the policy for the cash value, would wipe out the rights of the beneficiary altogether. And to award to the creditor the insured's contingent interest, to come into life only in the event he outlived the beneficiary, would throw the whole contract relations of the parties into confusion, and prejudice and finally in all probability wholly destroy the benefit intended by the law to protect in the beneficiary. With the insured's rights turned over to the creditor he naturally would have no further interest in keeping the policy alive by the payment of premiums; while the creditor would willingly let the policy lapse for nonpayment, accepting the lapsed value in discharge of his claim. It is not likely that any creditor, in a case where the policy

has 10 or 15 years to run, would consent to pay the maturing premiums, thus to keep the contract in force, in the hopes that the contingent interest of the insured would some time ripen by the death of the beneficiary, only to be confronted later on with the prior death of the insured and the unquestionable right of the beneficiary to the insurance and the whole thereof. A situation of that kind is not at all improbable. Other uncertainties and confusion readily are suggested, all to the detriment of the beneficiary and all impairing the rights intended to be secured by the statute. The court should not create a situation which will bring about results of the kind. It will be time enough for the creditor to reach out for the contingent interest of the insured after the rights of the beneficiary have been terminated by death or other lawful way.

We conclude, therefore, that the learned trial judge correctly disposed of the case and the judgment appealed from will be and is affirmed.

ALFRED H. TEIG v. NICHOLAS LINSTER AND ANOTHER.[1]

October 14, 1921.

No. 22,437.

Reformation of contract — loss of building — omission in written contract.

1. The evidence sustains the findings that in the agreement for the sale of a farm there was a provision that the vendors should bear the loss if any buildings thereon should be destroyed before possession was delivered to the vendee, and that such provision was omitted from the written contract through mutual mistake.

Admission of testimony.

2. There was no error in the admission of certain testimony.

Action in the district court for Nicollet county to reform a contract for the sale of land. The opinion states the facts. The case was tried before Olsen, J., who made the findings mentioned in the third paragraph of the opinion. Defendants' motion to amend the findings and

[1]Reported in 184 N. W. 609.

conclusions or for a new trial, was denied. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

H. L. & J. W. Schmitt & H. W. Volk, for appellants.

Haycraft & McCune, for respondent.

HOLT, J.

Action for the reformation of a contract for the sale and purchase of a farm. The relief asked was granted, and defendants appeal from the judgment, their motion for a new trial or amended findings having been denied.

Defendants agreed to sell their farm to plaintiff, and on April 12, 1920, they, with plaintiff, went to an attorney to have the agreement reduced to writing and executed. While the contract was being prepared, or just prior to affixing the signature of the parties, the attorney deemed it his duty to advise the parties that under the circumstances of that deal the vendors would have to bear the loss, should the buildings be lost or damaged through fire or other cause. Plaintiff said nothing, but a daughter of defendants, who was there to assist them, demurred to this. Then, at the suggestion of the attorney that they could protect themselves by insurance, and, after consulting with defendants, she stated that it was all right and they would take out additional insurance. There is no contradiction on this point, except that the daughter testified that she did not consult with defendants, and they testified they did not hear or understand that the attorney made the statement mentioned. The defendant Mr. Linster was somewhat hard of hearing. Both he and his wife were well advanced in years and understood and spoke the English language with some difficulty. An agent with whom defendants had listed the farm for sale and another person who had assisted him were also present, and heard what was said when the contract was drawn and signed. Both corroborate plaintiff's claim.

The court found that it was understood and agreed at the time of making the contract, and before signing the same, that the premises described in said contract were to be delivered to plaintiff March 1, 1921, in the same condition as they were on April 12, 1920, reasonable wear and tear excepted, and that any loss or damage to buildings on said

premises before March 1, 1921, should be borne by defendants. And also that by mutual mistake and inadvertence of the parties and because they did believe and understand that the contract as made did so obligate the defendants, the provision above stated was omitted from the contract.

The main contention of appellants is that the evidence does not sustain the findings mentioned. We have examined the record attentively, having in mind the rule that it must be clear and convincing in order to warrant reformation, and reach the conclusion that the findings should stand. That the subject was discussed as to who should bear the loss if the buildings were destroyed before March 1, 1921, was distinctly admitted by the defendants' daughter. The proof is also quite convincing that she acceded to the proposition of the attorney. That she was there to aid and assist the defendants and that plaintiff could rely on what she consented to as their agent, is beyond controversy. That the provisions agreed upon, as found by the court, were not inserted in the contract was due to the, perhaps, mistaken notion of the scrivener that in legal effect they were embodied in the instrument he had prepared. He was acting for both parties and his mistake, if any, which all adopted by acquiescing therein, became a mutual mistake.

The authorities are not all one way that the attorney's notion of the law was wrong. 27 R.C.L. §§ 293, 295, title Vendor and Purchaser. But that is immaterial now. If the provisions were actually a part of the agreement, plaintiff is, under the circumstances, entitled to have them made a part of the written contract, whether they were or were not essential to protect him against the loss the parties had in mind. The rule applicable here is one stated in Wall v. Meilke, 89 Minn. 232, 94 N. W. 688, in these words: "If, however, the parties to an agreement, while in the process of reducing it to writing, fall into error, and the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere, and grant the appropriate relief to the same extent as if the failure of the writing to express the real contract was caused by mistake of fact."

The terms of the deal made it of some importance to the parties that they have an understanding as to who should bear the loss in case of

destruction of the buildings. The vendors were to remain in possession and have the use and care of the premises for almost a year, and during that time interest did not run on the unpaid purchase price. It is true, each could protect his interest by insurance. But it was important to know who should secure this protection. The attorney, appreciating the situation, deemed it proper, and rightly so, to bring the matter to the attention of the parties. Their attention having been aroused, it is not difficult to reach the conclusion that an agreement was reached with reference thereto.

It is claimed that the court erred in admitting proof that defendants thereafter increased the insurance on the buildings. We think not. Subsequent conduct of a party in relation to a matter may throw some light as to the existence of a prior agreement with reference thereto.

The judgment is affirmed.

NELS J. MOE v. OLIVER E. SHAFFER.[1]

October 14, 1921.

No. 22,442.

Judgment — entry on warrant of attorney.

1. A judgment is not void for want of service of process, if entered upon a warrant of attorney expressly authorizing its entry without process.

Fraud waived by new agreement after discovery.

2. A party to a contract procured by fraud waives the fraud, if, after discovering it, he enters into a new agreement for the discharge of his obligation on different terms. Humphrey v. Sievers, 137 Minn. 373, followed and applied.

Judgment — defense against judgment of court of record of another state.

3. The only defenses to an action upon a judgment of a court of record of a sister state, are want of jurisdiction, fraud or payment. The presumption is that the court properly fixed the amount included in the judgment for attorney's fees.

[1]Reported in 184 N. W. 785.

Limitation of action — bar to cause arising in another state.

4. If no action could be maintained on a cause of action in the state where it arose because of the bar of the statute of limitations, none can be maintained in the courts of this state, unless plaintiff has been a citizen thereof ever since the cause of action accrued.

Same — defendant's absence from state must be set up in reply.

5. When the statute of limitations is pleaded as a defense, if the facts bring the case within any of the exceptions to the statute, they must be set up by reply. Defendant's absence from the state is such an exception.

Statute of foreign state need not be pleaded in haec verba.

6. It is not necessary, in pleading a statute of a foreign state, to set it forth in haec verba. It is sufficient if its terms are so pleaded that the court can determine its effect.

Allegation of nonexistent statute may be stricken.

7. If in fact a statute which is pleaded is not in effect, that part of the pleading may be stricken as sham.

Action in the district court for Wilkin county to recover $4,988.98 upon a judgment entered in the circuit court of La Salle county, Illinois. The defenses are stated at the beginning of the opinion. Plaintiff's demurrer to parts of the amended answer was sustained, Flaherty, J. From the order sustaining the demurrer, defendant appealed. Reversed.

Lewis E. Jones, for appellant.

George D. Smith, for respondent.

LEES, C.

November 19, 1910, L. W. Brewer, as trustee in bankruptcy of the estate of the J. E. Edmunds Company, recovered a judgment against the defendant in the circuit court of La Salle county, a court of record of the state of Illinois. The judgment was founded on a promissory note executed by defendant to J. E. Edmunds, containing authority to any attorney of a court of record to appear in such court in term time or vacation and confess judgment without process in favor of the holder of the note for the amount unpaid thereon "with costs and —— dollars

attorney's fees." There was a partial payment of the judgment as the result of an execution issued thereon, and thereafter and in February, 1911, Brewer assigned the judgment to plaintiff who brought an action upon it in the district court of Wilkin county in February, 1920. The defendant answered setting up the following defenses:

(1) That the judgment was void for the reason that he was not served with process and did not appear in the circuit court of La Salle county.

(2) That the note was given in part payment for a stock of goods purchased from Edmunds by the defendant and that in making the sale Edmunds had practiced a fraud upon him in certain respects set out in the answer.

(3) That the judgment as entered included an attorney's fee of $400 which was not authorized by the terms of the warrant of attorney.

(4) That the statutes of Illinois provide that no action can be maintained on any judgment entered by confession or by virtue of a warrant of attorney or power contained in any promissory note after the expiration of seven years from the rendition of the judgment, unless the judgment has been renewed by a writ of scire facias or an original suit instituted thereon within said period of seven years; that said judgment had not been so renewed and was of no force or effect in the state of Illinois after November 18, 1917, and that any right of action thereon became barred by the statute of limitations of said state on said date.

Plaintiff demurred to each of these defenses separately and collectively on the ground that they did not state facts sufficient to constitute a defense and failed when taken separately or as a whole to state any equities in defendant's favor. The demurrer was sustained and defendant appealed.

1. The first defense was not good, for the reason that the warrant of attorney expressly authorized the entry of judgment without process.

2. The second defense was not good for the reason that defendant alleged that, after the note came into Brewer's hands, defendant informed him of the fraud Edmunds had perpetrated upon him, whereupon Brewer agreed that if defendant would assist him in discovering assets which Edmunds was believed to be concealing from his creditors, he, Brewer, would accept a certain sum in full payment of the note. It was

not alleged that defendant had paid the amount agreed upon or assisted Brewer in uncovering Edmund's hidden assets. This brings the case within the rule approved by this court that after discovering the deceit "the party deceived * * * must stand towards the other party at armslength, must comply with the terms of the contract on his part, must not ask favors of the other party or offer to perform the contract on conditions which he has no right to exact and must not make any new agreement or engagement respecting it. If he does so he waives the fraud." Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737; Tysdal v. Bergh, 142 Minn. 288, 172 N. W. 130.

3. The third defense was not good. It is elementary that the judgment of a court of record of a sister state is entitled to full faith and credit in this state and is not open to collateral attack. The only defenses that can be made to an action upon it in the courts of this state are want of jurisdiction, fraud or payment. Cone v. Hooper, 18 Minn. 476 (531); Alden v. W. J. Dyer & Bros. 92 Minn. 134, 99 N. W. 784; Tillinghast v. U. S. Sav. & Loan Co. 99 Minn. 62, 108 N. W. 472; Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302. The presumption is that the amount for which the judgment was entered was correct. Hersey v. Walsh, 38 Minn. 521, 38 N. W. 613, 8 Am. St. 689. It will be presumed that the court fixed the amount of attorney's fees, since it is not alleged and will not be presumed that the judgment was not entered by the court in term instead of in vacation. Gundlach v. Park, supra.

4. The fourth defense is good if sufficiently pleaded. If no action on the judgment could be maintained in Illinois after November 18, 1917, none could be maintained in this state after that date. G. S. 1913, § 7709; Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162.

There may be a statute in Illinois similar to G. S. 1913, § 7708, whereby the running of the statute of limitations is suspended during the absence of the debtor from the state, but if so it is nowhere set out in the pleadings, and, in any event, would not apply to an action on a judgment. Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450. Defendant having pleaded the statute of limitations as a defense, if the facts bring the case within any exceptions to the statute in force in Illinois,

they must be set up by reply. Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693; Board of Co. Commrs. of Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276; Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734; Riley v. Mankato L. & T. Co. 133 Minn. 289, 158 N. W. 391. If absence from the state is an exception it must be so pleaded by the plaintiff. West v. Hennessey, 58 Minn. 133, 59 N. W. 984.

It is urged that in pleading the Illinois statute it should have been set out in full, or at least so much of it as is material to the defense. A statement to that effect is found in Becht v. Harris, 4 Minn. 394 (504). In Hoyt v. McNeil, 13 Minn. 362 (390), it was said that the "terms" of a foreign statute must be set forth so that the court may determine whether the effect claimed for it is legitimate. This was repeated in Myers v. Chicago, St. P. M. & O. Ry. Co. 69 Minn. 476, 72 N. W. 694, 65 Am. St. 579, and is in accordance with the general rule that, in pleading the statute of a foreign state, it is not necessary to set it forth in haec verba, and that it is sufficient to state the substance of those portions of the statute that are relied on. 36 Cyc. 1241. Becht v. Harris, supra. Insofar as it intimates that the rule is otherwise it is disapproved. It is also urged that in J. L. Bieder Co. v. Rose, 138 Minn. 121, 164 N. W. 586, this court had before it the Illinois statute of limitations and expressly held an action on a judgment might be brought at any time within 20 years of the date of its rendition. In that case the judgment was not one by confession, and, if there is a statute such as defendant pleads here, it would not have been applicable.

Finally it is urged that in fact there is no such statute in effect. If this be true, plaintiffs may move to strike this defense from the answer as sham. G. S. 1913, § 7762.

Insofar as the demurrer goes to the defense of the statute of limitations, it should have been overruled, and sustained only as to the other defenses pleaded. The order sustaining it as to all the defenses pleaded must therefore be and it is hereby reversed.

FRED ALTON AND ANOTHER v. O. W. MERRITT AND OTHERS.

FRANK A. SANDIN, INTERVENER.[1]

October 14, 1921.

No. 22,474.

Action for broker's commission — error to direct verdict.

In an action to recover a real estate broker's commission the evidence is *held* to present issues of fact for the jury, and that the trial court erred in directing a verdict for defendants.

After the former appeal reported in 145 Minn. 426, 177 N. W. 770, the case was tried before Dean, J., who when the parties rested denied plaintiff's and intervener's motions for directed verdicts and granted defendants' motion for a directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

Haycraft & McCune, for appellant.

Allen, Seifert & Allen, for respondent.

BROWN, C. J.

This cause was here on a former appeal where the facts are stated. 145 Minn. 426, 177 N. W. 770. On the remand of the case a trial was had on which plaintiff tendered evidence which he claimed disclosed that he had produced to defendants a purchaser ready, able and willing to purchase the land in question on the terms named by defendants; that they sold the land to him, though at a higher price than that for which plaintiff was authorized to sell. The evidence presented in the record tends to sustain plaintiff's claim, and, further, that a purchaser for the land was procured by him within the time limit fixed by his listing contract. The court at the conclusion of the trial, both parties having rested on the evidence presented by plaintiff, directed a verdict

[1]Reported in 184 N. W. 610.

in favor of defendants. Plaintiff appealed from an order denying a new trial.

We have read the evidence with care and reach the conclusion that the issues presented by the pleadings should have been submitted to the jury, and that the court erred in directing a verdict. Whether plaintiff was the procuring cause of the sale was made by the evidence a question of fact. Esterly-Hoppin Co. v. Burns, 135 Minn. 1, 159 N. W. 1069; Henninger v. Burch, 90 Minn. 43, 95 N. W. 578; Hubachek v. Hazzard, 83 Minn. 437, 86 N. W. 426.

In view of a new trial we refrain from discussing the evidence; it is sufficient that we have read it and find therein sufficient to raise a question for the jury, and there we dismiss the subject. The inferences to be drawn from the present state of the evidence may be overcome when defendants are heard in full.

Order reversed.

COUNTY OF LE SUEUR v. THE GLOBE INDEMNITY COMPANY.[1]

October 14, 1921.

No. 22,483.

County ditch — time of filing petition.

1. Under our statutes regulating the establishment of county ditches, a petition filed before the county board takes any action, is filed in time.

Mailing of notice before publication valid.

2. A notice mailed two days before it is published is not void under a statute providing that notice shall be mailed within one week after beginning of the publication.

Waiver of notice — order prima facie evidence of regularity.

3. Failure to mail notice to landowners affected, as required by statute, may be waived, and, if waived, the proceeding is regular. The order establishing the ditch is prima facie evidence of the regularity of the proceeding.

[1]Reported in 184 N. W. 677.

Estoppel against surety of contractor.

4. A surety, who obligates himself to secure performance of a contract, is estopped from asserting that the contract was void.

Action in the district court for Le Sueur county to recover $3,304.39, from defendant as surety on the bond of Moffatt & Herrick, damages sustained by the county for nonperformance of their contract for the construction of county ditch No. 38. The facts are fully stated in the opinion. The case was tried before Tifft, J., who made findings and ordered judgment in favor of plaintiff. From an order denying its motion to amend the findings or for a new trial, defendant appealed. Affirmed.

Allen, Seifert & Allen, for appellant.

Charles C. Kolars and *L. W. Prendergast,* for respondent.

HALLAM, J.

On December 11, 1911, Henry Kritzer and ten others filed with the auditor of Le Sueur county a petition for a public ditch. On December 13 the auditor issued a notice of a hearing upon said petition on January 4, 1912. The petitioner's bond was filed January 4, 1912. On May 13, 1912, the report of the engineer and of viewers having been filed, the auditor gave notice of a final hearing on June 7, 1912. On May 14 the auditor mailed a copy of the notice to one of the landowners affected. On May 16 the publication of the notice was commenced.

There were many landowners affected. Their names appeared in the viewer's report, and the auditor knew their postoffice addresses, but he mailed the notice to but one.

On the hearing, an order establishing the ditch was made. The contract for constructing part of it was let to Moffatt & Herrick. To secure performance of their contract, these parties gave a bond with defendant as surety.

Moffatt & Herrick entered upon the performance of their contract. In April, 1913, they claimed that the proceeding was void, because of failure of the county auditor to mail notice to the property owners affected, and requested that defects in the proceeding be corrected.

On May 7, 1913, the auditor issued notice of a new hearing to be held June 16. This notice was published, posted and mailed. On the hearing, the county board declined to take action and the contractors abandoned their work. This action is brought to recover the damages sustained. The court found for plaintiff. Defendant appealed.

1. Defendant contends that the proceeding is void because the petitioners' bond was not filed before the notice of hearing on the petition was issued. The statute provides that "before the county board shall establish any ditch * * * one or more of such petitioners shall give bond." Chapter 384, § 3, p. 540, Laws 1911. The bond was filed before the county board took any action in the proceeding. The statute was complied with.

2. The statute provides that the auditor shall mail to all persons or corporations whose lands are affected, a "printed copy" of the notice of the hearing upon the petition and reports, within one week after the beginning of the publication of the notice. Defendant contends that the mailing of a notice two days before the publication was a nullity. This slight deviation from the statute seems to us of immaterial consequence. Every purpose of the notice was subserved.

3. Defendant contends that the failure of the auditor to mail notices to numerous landowners affected and whose addresses were well known, vitiated the whole proceeding. We have no doubt that this notice is necessary to bind the interest of the landowner affected. Curran v. County of Sibley, 47 Minn. 313, 50 N. W. 237; Lager v. County of Sibley, 100 Minn. 85, 110 N. W. 355; perhaps it does not vitiate the proceeding as to others. State v. Johnson, 111 Minn. 255, 126 N. W. 1074; State v. Nelson, 136 Minn. 272, 159 N. W. 758, 161 N. W. 576.

But this notice might be waived by the landowners. If all appeared at the hearing, no one could complain of the want of notice and the proceeding would be to all intents and purposes regular. The statute makes the order of the county board establishing the ditch prima facie evidence of the regularity of all the proceedings prior to the making of such order. Laws 1905, p. 336, c. 230, § 48. See Geib v. County of Morrison, 119 Minn. 261, 138 N. W. 24, 9 A.L.R. 839. This prima facie evidence was not rebutted.

4. We are of the opinion also that defendant, having obligated itself to secure performance of the contract of Moffatt & Herrick, is estopped from asserting that the contract was void. Moore v. Mayor, etc., of New York, 73 N. Y. 238, 29 Am. Rep. 134; Love v. Rockwell, 1 Wis. 382; Madison v. Am. Sanitary Engineering Co. 118 Wis. 480, 95 N. W. 1097.

Order affirmed.

STATE v. GEORGE W. ALLYN.[1]

October 14, 1921.

No. 22,577.

Minimum wage order — judicial notice not taken.

1. Chapter 547, Laws of 1913, providing for the appointment of a Minimum Wage Commission and investigation of wages of women and minors and the making of an order fixing a minimum wage by it, considered and *held* that a copy of such order must be mailed to each employer affected, so far as practicable, before the order becomes effective. Courts will not take judicial notice of such orders.

When such order is admissible in evidence.

2. To render the orders admissible in evidence, compliance with the provisions of section 6 must be shown.

Person of ordinary ability — exclusion of evidence error.

3. Chapter 547 delegates no power to the Minimum Wage Commission authorizing it to determine and define who shall be deemed persons of ordinary ability, but leaves that question open for the courts. It was error to exclude testimony as to whether the complainant, a minor, was a person of ordinary ability.

Action in the municipal court of Mankato. The charge against defendant will be found at the beginning of the opinion. The case was tried before Goff, J., and a jury which found defendant guilty. From an order denying his motion for a new trial, defendant appealed. Reversed.

[1]Reported in 184 N. W. 787.

Thomas Jefferson McDermott and *C. J. Laurisch,* for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham,* Assistant Attorney General, and *C. E. Phillips,* County Attorney, for respondent.

QUINN, J.

This action was instituted under chapter 547, p. 789, General Laws of Minnesota for 1913 in the municipal court of the city of Mankato. The complaint charged defendant with having employed a minor of ordinary ability as a clerk in the mercantile business at a weekly wage of less than $10.25, at Madison Lake, a village of less than 5,000 inhabitants, contrary to an order of the Minimum Wage Commission, designated as order No. 10, and against the form of the statute in such case made and provided. The cause was tried to a jury, a verdict returned against the defendant and from an order denying his motion for a new trial this appeal was taken.

Chapter 547 created and established a commission known as the Minimum Wage Commission, consisting of three persons, of whom the commissioner of labor shall be chairman, the Governor to appoint two others, one of whom shall be an employer of women and the third a woman who shall act as secretary. This statute provides for an investigation, by the commission, of wages paid to women and minors and the making of an order fixing a minimum wage. Section 6, p. 790, provides that: "The commission shall then issue an order, to be effective thirty days thereafter, making the wages thus determined the minimum wages in said occupation throughout the state. * * * A copy of said order shall be mailed, so far as practicable, to each employer affected; and each such employer shall be required to post such a reasonable number of copies as the commission may determine in each building or other work place in which affected workers are employed. The original order shall be filed with the commissioner of labor."

On July 5, 1919, the commission issued order No. 10, fixing the minimum wages for women and minors of ordinary ability in any occupation working not to exceed 48 hours per week, at or in any place other than a city, village or borough having 5,000 or more inhabitants

in the sum of $10.25 per week, to take effect and be in force on and after August 5, 1919. On the same day the commission adopted order No. 11, which defines learners and apprentices, fixes a minimum wage for the first three months, a higher wage for the second three months and a still higher wage for the third three months, and then attempts to provide that thereafter such learner or apprentice shall be deemed a worker of ordinary ability.

Upon the trial copies of the orders referred to were placed in evidence by the prosecution, but no proof as to any investigation or other acts of the commission was offered. There was no showing that such orders were ever published or copies thereof mailed to parties affected thereby. Defendant offered proof that he had never received copies of either of such orders or heard of the same either by mail or otherwise. These offers were objected to and excluded. Without notice of such orders an employer could hardly know of the wages thus established, much less post copies thereof in his place of business. While the law presumes that public officials properly perform their official acts in connection with their duties, yet such presumption may be rebutted by competent proof. The presumption of due receipt of a letter may be rebutted by evidence that it was not in fact received. 16 Cyc. 1070. The proof should have been received.

The purpose of the statute seems clear. No other mode of publication is provided for. The order when considered in connection with the statute amounts in effect to a penal law. To enforce such an order without notice would be to subject every employer to prosecution though innocent of any intent to evade the law. Such was not the intent of the legislature. We hold that under this statute the orders referred to do not become effective until 30 days after issue by the commission and the mailing of copies thereof, so far as practicable, to the employers affected. To render the orders admissible in evidence, compliance with the provisions of section 6 must be affirmatively shown. Courts will not take judicial notice of such orders. It then becomes the duty of such employer to post copies thereof as determined by the commission. The statute is mandatory as to the mailing and posting of copies of such orders.

The statute is silent as to the power of the commission to determine and define who shall be deemed workers of ordinary ability. It leaves those matters for the courts, especially in a criminal proceeding like this. It was therefore error on the part of the trial court to exclude the testimony bearing upon that phase of the case. For these reasons a new trial should be granted.

Reversed.

THE FARMERS CO-OPERATIVE EXCHANGE COMPANY OF GOOD THUNDER v. UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE.[1]

October 21, 1921.

No. 22,315.

Fidelity bond — notice to defendant of defalcation.

1. In an action on a fidelity bond which required plaintiff to give prompt notice whenever a defalcation was discovered, letters from plaintiff's attorney to defendant were admissible for the purpose of proving such notice, although they contained statements of the amount of the defalcation.

Admissions of embezzlement admissible against surety.

2. The admissions of the principal in the bond concerning his defalcations made to plaintiff's officers when they discovered and were investigating his misdoings and when he was still in plaintiff's employ, were admissible in evidence against defendant, his surety.

Verdict sustained.

3. The evidence is sufficient to sustain the verdict.

Action in the district court for Blue Earth county to recover $2,500 on an indemnity bond. The case was tried before Comstock, J., who at the close of the testimony denied defendant's motion for a directed verdict on the ground that plaintiff had failed to prove facts sufficient to constitute a cause of action, and a jury which returned a verdict for

[1]Reported in 184 N. W. 792.

the amount demanded and interest. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Cray & Eaton, for appellant.

Ivan Bowen and *S. B. Wilson,* for respondent.

TAYLOR, C.

Plaintiff operated an elevator at Good Thunder, Minnesota, and was engaged in the business of buying, shipping and selling grain. It employed one Emil O. Rosnow as manager and gave him full charge of the business, subject to the instructions given him from time to time by the president and board of directors. It procured a bond, executed by Rosnow as principal and defendant as surety, in which defendant agreed to make good and reimburse to plaintiff any loss sustained through any act of dishonesty on the part of Rosnow amounting to larceny or embezzlement. Plaintiff brought suit on this bond and recovered a verdict. Defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial, and presents 16 assignments of error.

Assignments 1 and 2 challenge the rulings of the court in admitting in evidence three exhibits, consisting of two letters written to defendant by plaintiff's attorney and a statement inclosed in the second letter showing the result of an audit of the books. These exhibits were offered for the purpose of showing that plaintiff had complied with a condition of the bond requiring it to give notice of any claim thereunder promptly after discovering the loss, and were received for no other purpose. The court, when admitting them, carefully explained to the jury that they were not evidence of any default on the part of Rosnow, but merely of the giving of notice to defendant. They were competent and material for this purpose, and the rulings were correct.

Assignments 3 to 7 inclusive challenge the rulings permitting plaintiff's president to testify to the market value of grain on the several dates on which Rosnow had shipped out grain that plaintiff claimed he had converted to his own use. These rulings were too obviously correct to require comment.

Assignments 8 to 13 inclusive challenge the rulings admitting in evidence the admissions of his misdoings made by Rosnow to plaintiff's president and board of directors. The objection urged to this evidence is that the admissions were not made at the time of the transactions to which they related but a considerable time thereafter.

Rosnow's admissions were to the effect that he had been speculating on his own account by buying and selling "futures" in grain on the board of trade; that these speculations had resulted in large losses; that he had conducted them in plaintiff's name without the knowledge of plaintiff's officers; that he had shipped out six carloads of plaintiff's grain and had wrongfully applied it in payment of these losses, and that he had concealed all these facts from plaintiff's officers as long as he was able to do so. These acts were committed in the course of his employment, and the losses of plaintiff resulting therefrom were losses for which defendant was liable under its bond. The admissions were made to plaintiff's president and board of directors while they were investigating what had become of this grain and its proceeds, and while Rosnow was still in plaintiff's employ as manager of its business. Proof of such admissions made by the principal under such circumstances is admissible as evidence against his surety. Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. 475; Capital Fire Ins. Co. v. Watson, 76 Minn. 387, 79 N. W. 601, 77 Am. St. 657; Hall v. U. S. Fidelity & Guaranty Co. 77 Minn. 24, 79 N. W. 590; 21 R. C. L. 1092, § 131; 1 Enc. Ev. 586; 2 Wigmore, Ev. p. 1277. It is true that the period covered by plaintiff's bond expired about a month before Rosnow made these admissions, but they related to transactions which took place during the period covered by the bond, and were made to the proper officers of plaintiff when they first discovered his default and in the performance of a duty which he owed to plaintiff. We hold that they were admissible against defendant, his surety.

Assignments 14 and 16 assert that the court erred in refusing to direct a verdict for defendant, and in refusing to grant a new trial. We will treat these assignments as raising the question whether the verdict is sustained by the evidence. They are clearly insufficient to raise any other question. 1 Dunnell, Minn. Dig. §§ 361, 363.

Defendant contends that the transactions which entailed the loss were hedging transactions made by Rosnow on behalf of plaintiff in the ordinary course of business. The evidence was ample to warrant the jury in finding that they were purely speculative transactions made by Rosnow wholly on his own account and for his own benefit, and without the knowledge of any of plaintiff's officers.

Defendant also contends that plaintiff failed to prove any loss resulting from Rosnow's wrongful doings, but we find ample evidence to justify the jury in finding that he disposed of six carloads of plaintiff's grain and wrongfully applied the proceeds thereof toward the payment of his losses, and that plaintiff never received any part of such proceeds. Defendant also contends that plaintiff failed to have its books audited as required by the bond, but the jury found the fact against it and the evidence is sufficient to sustain the finding. Defendant also contends that plaintiff was chargeable with notice of Rosnow's transactions from the entries in its books and records and by its conduct ratified them. Whatever may be the rule as to charging a corporation with notice of such transactions when they are entered in full on its books and the books are open for examination by its officers, it has no application here, for the evidence was sufficient to justify the jury in finding that the only record of these transactions consisted in the reports transmitted by the company with which Rosnow was dealing and that he withheld these reports from plaintiff's officers. It is true that these reports, or at least a part of them, were found in the files by the auditor employed by plaintiff to audit the books, and that he included them in making his audits, but this was not sufficient to charge plaintiff as a matter of law with knowledge of facts of which Rosnow intentionally kept its officers in ignorance. Apparently it was the shortage either in grain or funds shown by the last audit that led to the investigation which disclosed the true state of affairs. And we find nothing in the record which required the jury to find that plaintiff had either consented to, ratified or approved these transactions. The evidence taken as a whole fully justified the verdict.

The fifteenth assignment calls in question certain portions of the

charge to the jury. The charge was full, clear and eminently fair, and we find nothing therein of which defendant has any cause to complain.

Order affirmed.

HENRY P. REED AND OTHERS v. VILLAGE OF HIBBING AND OHTERS.[1]

October 21, 1921.

No. 22,336.

Injunction — vacation of streets and change of railway tracks — conspiracy.

Plaintiffs, taxpayers and residents of the village of Hibbing, in behalf of themselves and other residents, bring this action to enjoin defendants from doing the acts necessary to be done in order that the defendant, owning the iron ore deposit under the townsite of Hibbing, may mine the same; the claim being that defendants have entered an unlawful conspiracy to vacate the streets, change the route of an electric railway, unlawfully dispose of public property, and have engaged in unfair competition to remove the business and residence portion of the village from the old to a new location therein, it is *held*:

(1) The private interests of plaintiffs will not be invaded by the proposed vacation of the streets in the townsite nor by the mining, so long as the street between them and the mining operation is left safe for public travel. When the mining is so conducted as to constitute a nuisance as to them, it is time to apply for relief and not now.

(2) The finding is sustained that no unlawful conspiracy exists between defendants. No defendant has been shown to intend an unlawful act nor to employ unlawful means in attaining a lawful end, either singly or in unity with some other.

(3) Insofar as plaintiffs are and represent taxpayers, the complaint that the taxes will be increased and property in other parts of the village depreciated by building up the new business center where the mining company intends, must be considered in connection with the situation and the employment and revenue, public and private, to be derived from mining the townsite.

(4) None of defendants intend to take any unlawful step in seeking to vacate the streets. In the vacation both private and public rights

[1]Reported in 184 N. W. 842.

can be protected and compensation for injuries given. Defendants cannot be forced in this action to seek vacation of streets.

(5) The franchise under which the defendant railway company occupied a street in the townsite provided for a change of route by agreement. The village council, with the consent of the company, could and did change the route. The change has been approved by the Railroad and Warehouse Commission. It cannot be questioned by plaintiff. It is unnecessary to decide whether the company is a street railway or an interurban railroad.

(6) The threatened sale of the village property has not reached a point where a court should interfere. A village may dispose of its property when occasion arises, unless it was acquired through a grant which forbids a sale.

(7) The alleged unfair competition of the mining company was not proven.

(8) The validity of the ore reservations in the deeds to the lots in the townsite are not properly for consideration on this appeal.

(9) Plaintiffs, not being entitled to an injunction, cannot claim the right to have the court retain the action to award anticipated damages.

(10) There was no error in rulings during the trial, and no abuse of discretion in refusing to grant an amendment to the complaint.

(11) It is not perceived that any violation of the Fourteenth Amendment of the Federal Constitution occurs in denying plaintiffs relief herein.

Action in the district court for St. Louis county to recover damages in the sum of at least $500,000 and to restrain defendants from doing anything in furtherance of a sale of defendant village property or the removal of the village of Hibbing from its present location. The case was tried before Freeman, J., who made findings in favor of defendant and dissolved the temporary injunction. From an order denying their motion for amended findings or a new trial, plaintiffs appealed. Affirmed.

H. V. Mercer and *C. G. Anderson,* for appellants.

Fryberger, Fulton, Hoshour & Zeismer, Davis, Severance & Morgan, Frank D. Adams, Elmer F. Blu, D. T. Collins and *Washburn, Bailey & Mitchell,* for respondents.

HOLT, J.

The action is to enjoin defendants from carrying out an alleged unlawful conspiracy to destroy, by mining, a part of the village of Hibbing under which is a valuable iron ore deposit. The injunction was denied and from the order denying a new trial plaintiffs appeal.

The 73 plaintiffs are residents and taxpayers in the village. The village and its officers, the Oliver Iron Mining Company, the owner of the ore, and the Mesaba Railway Company, which owns and operates an electric railway into the village, are the defendants. The village was organized in 1893 with 326 inhabitants, but has now a population of over 15,000, and has greatly extended its limits, particularly to the south where the village of Alice has been taken in. Under part, at least, of the original village area was valuable iron ore. A 40-acre tract of the townsite of Hibbing, being the S.W.¼ of the N.W.¼ of section 6, and hereinafter referred to as the townsite, is the territory that has occasioned this lawsuit. On this forty has grown up the business center of the village. An expensive village hall has been built thereon. To the north, east, and west thereof open pit mining has been carried on and progressed to the very edge of the townsite. The pits are excavated to a depth of more than 200 feet. The electric railway enters the village from the north upon a steel bridge spanning an open pit, and passes south on Third avenue through the center of the forty and south through the center of Pillsbury and southern additions. It connects several mining towns on the iron range, Gilbert being its eastern and Hibbing its western terminus.

The owners of this forty dedicated the streets to the public, but in selling lots reserved the minerals and the right to enter upon the surface to explore for and to mine and remove the ore. The defendant mining company has succeeded to the reservations. It has acquired the fee to 90 per cent of the surface, and aims to acquire the balance. Its purpose for a long time has been to so arrange matters that it may be able to mine the ore in that forty. To that end the buildings it owns will be torn down or removed to two platted additions, known as Central and Park, located about 1½ miles south of its ore land, where it is hoped the future business center of the village will be established. It is freely

admitted by the mining company that it intends to mine the ore referred to as soon as it can be done lawfully; that it cannot be so mined until the streets upon this forty are vacated, and hence it will seek their vacation when the time is ripe; that it has opened negotiations for the purchase of the village hall; that it has sought to facilitate the change of route of the electric railway so that it will not traverse any part of the forty, and that it acquired Central and Park additions with a view of moving the buildings from the townsite thereon, and erecting hotels, residences and business blocks for sale or rent to those who might desire to locate there in preference to further north.

We have been favored with exhaustive briefs of over 700 pages, citing an abundance of authorities, and discussing the numerous questions of law and fact which the well known diligence and ingenuity of the learned counsel have injected into the case. But those matters only will be considered which in our judgment are determinative of the question whether an injunction should issue upon the facts found, or upon those facts, if any, that ought to have been found from the evidence.

Plaintiff's right to relief must rest either upon a threatened invasion of their private property interests or their interests as taxpayers and residents of the village. We assume, for the purposes of this decision, that as taxpayers and residents they may maintain an action in protection of public rights, that is, the rights of the village and its inhabitants.

As to any threatened invasion of their private interests, it is enough to state that none of plaintiffs resides upon or does business within the townsite. They are all located on the Pillsbury or Southern additions to the south. The street running east and west between the townsite, the forty in question, and the two additions last mentioned to the south thereof where plaintiffs either reside, do business or own property, is not shown to be threatened with vacation, therefore they cannot be left with cul-de-sac streets. The inconvenience in reaching territory north of Hibbing is an inconvenience common to the public of which plaintiffs cannot complain. Thorpe v. City of Ada, 137 Minn. 86, 162 N. W. 886. Of course any mining operation to the north of the dividing street mentioned must be so carried on that the street will be safe for travel. So long as that condition remains plaintiffs' interests south of the street

are not endangered. At any rate, mining in the north part of the forty can undoubtedly be carried on to a great extent without any direct interference with persons and property in the additions mentioned. In this aspect of the case we agree with the court below that the action is premature.

No court will stop a great mining enterprise, unless it is made to appear that an invasion of private or public right is imminent. Nor do we think there is much substance to the claim that mining could be carried on nowhere in the townsite without constituting a nuisance to plaintiffs. Flying fragments, noise and vibrations from blasting, and smoke and rattle from steam shovels and ore trains, may be so controlled as not to interfere materially with the peace and comfort of residents to the south of the forty. It is reasonable to require those, who take up a business or residence in a municipality dependent for its very existence upon the industry there carried on, to somewhat endure the disturbances and discomforts that unavoidably attend the proper and careful operation of the industry. It cannot now be said upon this record that no mining operations can be carried on in the townsite within the rules enunciated in Brede v. Minnesota Crushed Stone Co. 143 Minn. 374, 173 N. W. 805, 6 A.L.R. 1092, and 146 Minn. 406, 178 N. W. 820, 179 N. W. 638.

It is contended that, in order to remove all its ore in the townsite, the cross street mentioned and a large part of the adjacent additions to the south must eventually be destroyed or appropriated for a slope. Therefore, since plaintiffs have come into a court of equity, the court should retain jurisdiction and ascertain and award the damages which plaintiffs will ultimately suffer for the injury to their property. The short answer to the contention is that, as matters now stand, it is not to be assumed that defendants will so mine that the lateral support of either the street mentioned or of plaintiffs' real estate to the south thereof will be impaired or destroyed. When that is attempted the time is ripe for injunctive relief. There is no way in which this action may be converted into a condemnation proceeding. The mining company has not the right of eminent domain, nor can it be forced to take the property under that right. We conclude that plaintiffs have not shown them-

selves entitled to an injunction or other relief for the protection of any private right of person or property.

The complaint charges a conspiracy between defendants to move the village so as to locate its business center in Central and Park additions upon ground where there is no underlying ore. The finding is that none of the defendants "has combined, arranged, or conspired with any of the other defendants herein to injure the plaintiffs or their businesses or properties, or to accomplish any unlawful end, or any lawful end by unlawful means." We think the evidence amply sustains this finding. The removal and marketing of many millions of tons of ore by the rightful owner must be conceded a lawful and even laudable enterprise. It gives employment, and is productive of revenue for the owner, the nation, the state and the municipality. Has the mining company separately or with the aid of any other defendant resorted to any unlawful means or does it threaten so to do in order to remove this ore? It certainly has done no wrong in buying the surface rights on this forty or in removing the buildings therefrom, or in erecting or encouraging the erection of buildings in a part of the village where no ore beds exist. Nor can a property owner be accused of using unlawful means if he applies to the proper authorities to change the routing of an electric railway operated on streets along or across his land, or takes such steps as the law provides for the vacation of public streets thereon. The mining company disclaimed any intention or threat to disturb any street or bridge over any public road until the same had been legally vacated. The court found this true, and could not well have found otherwise.

Much is made of the fact that an officer of the village, who had begun the erection of an extensive building on lots owned by him in Pillsbury addition, sold his lots to the mining company, and removed the building material therefrom, and erected his building in the new location. There is no evidence to show that this was anything but a legitimate business transaction. The officer, when his attention was called to the new location, appreciated that it was more desirable than the one he had for a business block. It does not appear that the price paid for the new site nor that received for the old was other than the going market price. Nor is there any evidence from which an inference

can be drawn that the village was to yield any rights or that the officer should use his influence to procure any advantage to the mining company because of the deal.

In finding that there was no conspiracy, and in finding that where there was unity of purpose or action between any of the defendants the end was lawful and the means employed to attain such end were not unlawful so far as concerned public interests or the interests of the village, the court could properly consider the fact that the present growth and prosperity of the village is the result of the mining of the ore immediately adjacent thereto; that a continuance of such growth and prosperity depends upon a continuance of this industry; that an immense body of ore underlies the townsite and will furnish employment for years and produce revenue both to the owners of the ore and the public, and that if public improvements in the townsite have to be discarded and new ones made in the new location, involving great expenditure of public and private funds, the burden will fall almost wholly on the mining companies. The findings are that such companies now pay 98 per cent of the municipal taxes, of which the Oliver Mining Company contributes 85 per cent, and that 3,000 of the 15,000 inhabitants are employed in the mining operations in and adjacent to the village. It is also worthy of consideration that the permanent location of the village should be where the use and development of the natural resources will not be prevented. All of the defendants, and especially the village officers, may properly take these matters into consideration, and, from the point of view of the best interests of the public and the municipality, it is not difficult to see benefits greatly exceeding the expense found in the removal and destruction of the townsite buildings, streets and improvements, and the erection of the business buildings, schools, public buildings and homes in a new location.

It will be necessary to note some of the particular facts upon which the claim for equitable relief is grounded, viz., the bridge and streets, the electric railway, the village hall, the mining nuisance, the unfair competition and the mining reservations, for, even though no conspiracy was shown, still, if the conduct of any one of the defendants warrants relief, it should be granted.

Several years ago the mining company, at a cost of over $80,000, erected the bridge across the open pit mine on the north of the townsite. This bridge furnishes the only means of direct ingress and egress to the village from the north. The electric railway also runs thereon. The court found this bridge to be part of the public highway. It is therefore contended it cannot be destroyed or removed. If the streets it connects are vacated, the bridge would no longer serve a public purpose, and no valid objection could be raised to its removal. Whose the salvage will be is not involved on this appeal. And whether the authority to vacate streets in Hibbing is lodged in the village council or the district court, is not necessary to consider. It cannot seriously be doubted that streets in a village may be lawfully vacated. And were it not so, the legislature could surely grant the authority. We need go no further, for the finding and the undisputed evidence are that no mining will be attempted or can be done until the streets are lawfully vacated. If they cannot be, there will be no occasion for demanding an injunction or any of the relief asked for in this action. It may also be suggested that the mining company's present intention to sometime in the future make application for the vacation of the streets on the townsite, does not give plaintiffs the right to force the company to proceed now so to do. This is too plain for argument.

The electric railway obtained a franchise to run cars into the village on certain streets, which franchise has 25 years yet to run. The village council has passed an ordinance permitting the company to change its route into the townsite, so that now, before it reaches the northerly limits of the village, it turns east and skirts the easterly boundaries, avoiding passing over known ore deposits, and then turns westerly and northerly, passing through Central, Park, Southern and Pillsbury additions, terminating at the south townsite line. The railway company, conceiving that it was an interurban railway, also asked for and was granted permission by the Railroad and Warehouse Commission to make the change. The order granting permission was not appealed from, and is now final. If the company is a railroad within the control of the commission the abandonment of the old and the adoption of the new route cannot be questioned at this time. But plaintiffs earnestly contend that it is a

street railway, and hence the Railroad and Warehouse Commission had no jurisdiction to make the order. We need not pass on the status of the railway company, for we have no doubt that the village council has full power to change the routing of the car lines on its streets. In fact, the original franchise contains a provision that by agreement the parties may change the route. The ordinance of 1919, accepted by the company, granted this change. Courts will not interfere with the judgment of the village authorities as to the streets upon which electric cars shall run. The length and conveniency of the new route, as compared with the old, are for the village authorities. It is doubtful whether plaintiffs have any standing to question the change of route of any railway. See Henry v. Ann Arbor R. Co. 116 Mich. 314, 75 N. W. 886.

The negotiations for the sale of the village hall have not reached the point where a court should interpose its arm. The mining company signified to the village council that it was willing to buy, and the council has appointed a committee to ascertain the cost or value of the property. That is as far as matters have progressed. Chapter 149, p. 287, Laws 1891, amending the law under which the village of Hibbing is incorporated, gives the council the power "to receive, purchase and hold for the use of said village any estate, real and personal, and to sell, convey, lease or otherwise dispose of the same." There can be no doubt, under this statute, of the power of the village to dispose of a village-owned building, when, by virtue of its location or inadequacy, it has ceased efficiently to serve the public purpose for which it was built, there being no restrictions against any use or disposition in the grant through which the village derived title. Thompson v. Nemeyer, 59 Oh. St. 486, 52 N. W. 1024; Shaver v. Town of Salisbury, 68 N. C. 273.

We have already covered the alleged mining nuisance. It can hardly be claimed that plaintiffs, as representing the village or the public, may prevent mining operations as a nuisance when they have not made out a case for relief as individuals occupying property as near to the place intended to be mined as any other inhabitant.

We are not impressed with the proposition that the court should have found that the mining company had entered upon a course of unfair competition in attempting to establish the new village center, thereby

causing irreparable injury to plaintiffs as individuals and as members of the community. No false representations were proven against the company. For many years it has been known that it intended to mine the townsite at some time, and in preparation thereof was acquiring the surface rights or fee. Its acquisition of Central and Park additions was no secret, and openly the work of improvements thereon has proceeded, but, apparently, without holding out any inducements for people to there locate, other than the advantage that the place itself and its improvements offered over places further north in proximity to ore beds and mining operations. An individual or corporation, having a peculiar interest in developing a certain part of a city or village, may work toward that end without being charged with unfair competition, even though such development indirectly depreciates values and retards growth in other parts of the municipality, at least, so long as no misrepresentations as to other localities or unfair means towards them are employed. We have discovered no evidence of any unfairness or deception used by any of defendants in the development of the new business center of the village. The mining company had the right to buy the surface rights in the townsite. It had also the right, so far as plaintiffs are concerned, to buy Central and Park additions. In dismantling the townsite and upbuilding the additions, it invades no rights of plaintiffs. Its efforts may not be charged with malice as in the case of Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946, 22 L.R.A.(N.S.) 599, 131 Am. St. 446, 16 Ann. Cas. 807, for the sole purpose is to make it possible to mine its valuable ore deposit, a perfectly legitimate object.

Another claim is that the reservations held by the mining company to the ore under the townsite are void. If that were true it would affect only the price of the village property. As to the other property in the townsite, the company either has the surface, or fee, or intends to acquire it before starting mining. We decline to pass on the validity of the mineral reservations in the deeds through which the mining company claims. It is not necessary for a decision here.

But plaintiffs maintain that, if not entitled to an injunction, the court should nevertheless retain the case to award damages. As already shown, there is no way in which this action may be converted into a

condemnation proceeding. The mining company cannot be forced to mine or to buy plaintiffs out, or pay for anticipated damages in the distant future. In the proceedings to vacate the streets, appropriate damages may be awarded to those entitled thereto. If, after mining operations are started, any public or private rights suffer injury, it is time to call upon the courts for protection or compensation. No nuisance, trespass or wrong, either to private or public property or to persons, has been shown to be impending.

Complaint is made of rulings on the reception of evidence. Whether the mining company is within its corporate powers in buying and improving real estate, cannot have any bearing upon plaintiff's right to relief, and hence the exclusion of the company's articles of incorporation was not error. Nor was it material to plaintiffs' case to show that the mining company blasted a hole in the right of way of the Great Northern Railway Company after it had obtained possession from the Railroad and Warehouse Commission to move its tracks to the south. Testimony from the mining company's officers, regarding their intentions as to the steps to be taken before beginning to mine, was proper to meet the charge that unlawful acts were contemplated or threatened.

There was no error in refusing plaintiffs to amend the complaint so as to litigate the interests of the town of Stuntz which adjoins but is no part of Hibbing.

We see nothing in the contention that, unless the injunction is granted or the anticipated damages that may flow from mining the townsite are adjusted in this action, plaintiffs will be deprived of their property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. When any one of the plaintiffs shows an injury to his person or property from the acts of defendants, he is entitled to protection and damages, or shows that but for the interposition of the court an irreparable injury will occur to his person or property rights. But no such showing was made. The anticipated injuries to the village and its inhabitants and taxpayers are either too remote or problematic to resort to the remedy of an injunction now, or else it is plain that, in the legal or statutory proceedings, which the mining company must take before it can begin to mine, the law furnishes ample redress.

Whilst the court below in the memorandum stated that it will require the expenditure of enormous sums of money by the municipality to furnish the inhabitants of South Hibbing, that is, the new location, with the same municipal facilities that the residents of Southern and Pillsbury additions now have, such statement is not made a part of the findings. It is not clear what the court refers to. True, the change of the business center or residence center within any village or city involves large expenditures for streets, sidewalks, watermains and the like, but the bulk of these expenditures is borne by the abutting real estate if Hibbing assesses the amount against benefited property as is authorized by the law under which the village organized. There are certain other expenses that must come from the taxpayers generally, such as fire and police protection and the cost of public buildings. If this is what the court means, such cost is incident to the growth and development of any city, where for various reasons the center of population moves and the public buildings and improvements in the old location fail properly to serve the new demands. Who can say whether it is not vastly to the pecuniary advantage of not only Hibbing and its inhabitants and taxpayers, but to the state and nation as well, that every merchantable ore deposit within the village limits be mined and to that end all buildings be moved to some part within its extensive limits where is no ore? The taxes and public revenues derived from mining operations have been enormous in the past and will be hereafter so long as there is ore to mine. And, as before pointed out, the mining companies have so far paid all but a fraction of the municipal expenses of Hibbing.

In passing upon the right or wrong of increased taxation to plaintiffs, it is well to remember that a practice, so general that notice may well be taken thereof, has prevailed in the mining regions of this state, for villages to extend their limits so as to take in every suspected ore body within reach, and without regard to the fitness or need of such territory for business or residence purposes. And this against the most vigorous opposition from the mine and ore owners. Hibbing's dimensions now are, roughly speaking, five miles long and three miles wide, while originally it consisted of but four sections. It is true, the ore body here involved underlies the original village plat, but the policy of Hibbing, like

the other villages, has been to expand so as to embrace adjacent ore lands, and there should rest a reciprocal duty upon the village and its taxpayers to permit these ore lands to be mined when it can be done lawfully, even if some additional public expense incidentally results therefrom. We think the decision of the learned trial court is right under any view of the law and facts of the case.

Order affirmed.

AMELIA HUNT v. HENRY KEYE.[1]

October 21, 1921.

No. 22,349.

Boundary — courses and distances yield to monuments.

1. Courses and distances shown on a plat must yield to the monuments and fixed points shown thereon if inconsistent therewith.

Street bounded by right of way — platted width yields to actual width.

2. Where the plat of a townsite locates a street along and adjoining a pre-existing railroad right of way which, in fact, is only 75 feet in width on each side of the track, but is marked on the plat of the townsite as 100 feet in width on each side thereof, the width marked on the plat must yield to the true width, and the right of way as it actually existed on the ground forms the boundary of the street.

Action in the district court for Marshall county to restrain defendant from trespassing and $300 treble damages. The case was tried before Grindeland, J., who at the close of the testimony discharged the jury on the ground that if plaintiff was entitled to recover at all it would be only nominal damages, made findings and ordered judgment in favor of defendant. Plaintiff's motion for amended findings or for a new trial was denied. From the order denying his motion for a new trial, plaintiff appealed. Reversed.

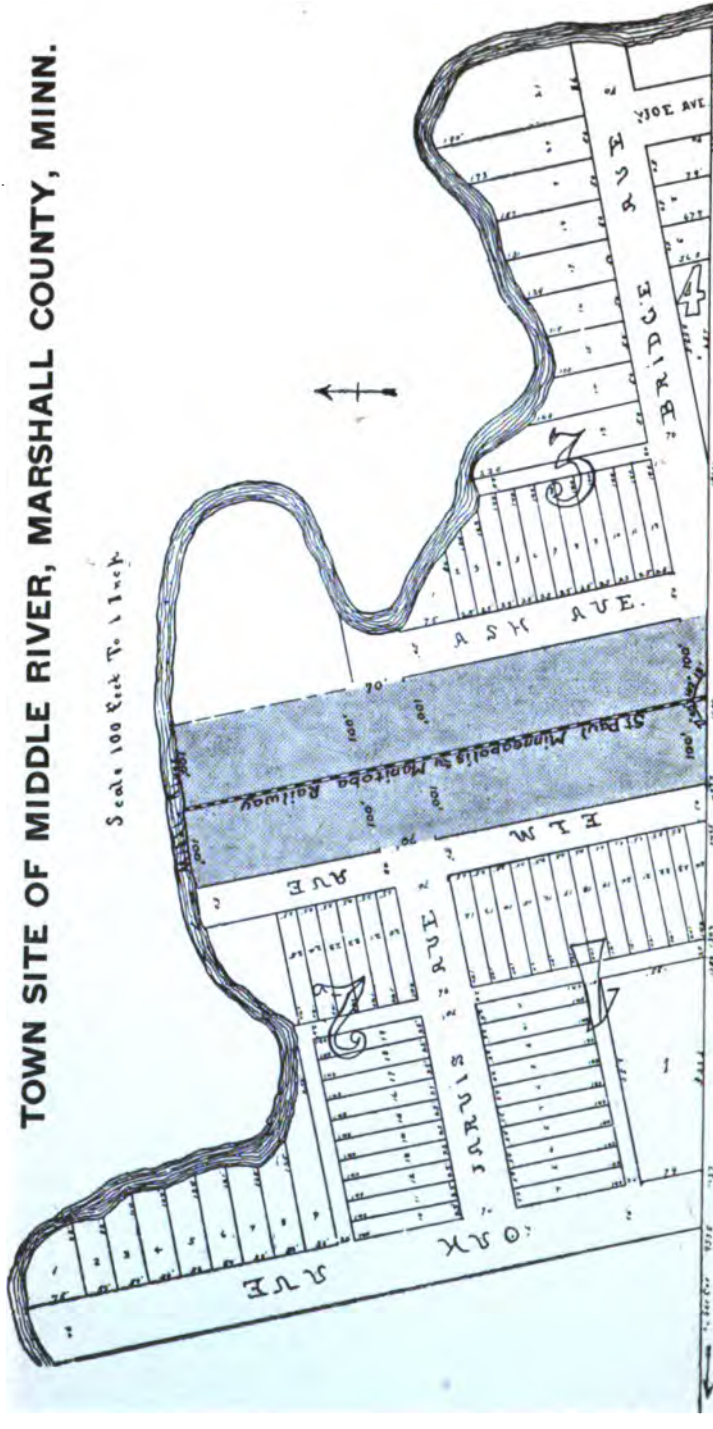
[1]Reported in 184 N. W. 840.

A. N. Eckstrom, for appellant.

E. A. Brekke, Julius J. Olson and *Rasmus Hage,* for respondent.

TAYLOR, C.

The controversy in this case is over the location of a boundary line in the townsite of Middle River located in the south half of the southwest quarter of section 10 in township 156 north of range 48 west in Marshall county. The townsite was platted two years or more after the St. Paul, Minneapolis & Manitoba Railway had been constructed across this section, and lies on both sides of the railroad right of way. A copy of the plat will be found on page 144:


TOWN SITE OF MIDDLE RIVER, MARSHALL COUNTY, MINN.
Scale 100 Feet To 1 Inch
ASH AVE.
ELM AVE.
OAK AVE.
MAPLE AVE.
ST. PAUL AVE.
St. Paul, Minneapolis & Manitoba Railway

Ash avenue, 50 feet in width, extends along the eastern side of the railroad right of way parallel with the railroad track. Bridge avenue, 70 feet in width, extends from Ash avenue to the river at a right angle to the railroad track. Block 3 is bounded on the south by Bridge avenue, on the west by Ash avenue, and on the north and east by the river. It is divided into two parts by an alley, 20 feet in width, extending from Bridge avenue to the river, parallel with Ash avenue and distant 140 feet therefrom. The portion of the block between Ash avenue and the alley is subdivided into 12 lots fronting on Ash avenue, numbered consecutively 1 to 12 beginning at the north, and each 25 feet in width except lot 1. The portion of the block east of the alley is subdivided into 9 lots fronting on Bridge avenue and extending from that avenue to the river, numbered consecutively 13 to 21 beginning at the alley, and each 50 feet in width except lot 21 which is bounded on the east and north by the river.

Defendant is the owner of the 12 lots fronting on Ash avenue and testified that he had lived there 24 years. Plaintiff is the owner of lots 13, 14 and 15 fronting on Bridge avenue and has occupied them as a home since 1892. Her dwelling house is on lot 13 which adjoins the alley. Joseph Le Blance is the owner of lots 16, 17 and 18 and has occupied them since 1894. Dan Erickson is the owner of lots 19, 20 and 21, having purchased them shortly before this suit. How long they had been occupied does not appear. While perhaps not important in this case, it may be proper to mention that a public highway has been established along the section line which forms the south boundary of the townsite; that Bridge avenue, or that part thereof not included in this highway, has been vacated, and that the owners of lots in block 3 have acquired that portion of Bridge avenue and of block 4 lying between their respective lots and this highway, thus making this highway the south boundary of their several properties.

Until shortly before the acts which led to this lawsuit, all the owners of lots in block 3 unquestionably understood that the railroad right of way was 75 feet in width on each side of the center line of the railroad track, for they located the east and west boundary lines of their respective properties by computing the distance of such lines from the

railroad track, allowing 75 feet for the right of way, and have occupied, improved and used such properties to the boundaries so located ever since acquiring them, a period of more than 20 years on the part of both plaintiff and defendant. The village officers also seem to have understood that Ash avenue was only 75 feet from the railroad track, for they graded it as so located.

Defendant learned that the right of way was marked on the plat of the townsite as 100 feet in width on each side of the railroad track, and in October, 1919, claimed that his eastern boundary line was 290 feet from the track, being 100 feet for the right of way, 50 feet for Ash avenue and 140 feet for the depth of his lots, and measured off this distance from the center line of the track and began constructing a fence along the line so located and from this line along his south line. According to his contention the boundary lines of the lots in block 3 are 25 feet east of the lines which have always been recognized and accepted as such boundary lines. Moving these lines 25 feet east will bring Ash avenue within less than one foot of defendant's own house, will bring the alley within a few inches of plaintiff's house, will place plaintiff's barn partly on defendant's land and partly in the alley, will place the walk from plaintiff's house to the highway partly in the alley, and will place a row of trees set out by plaintiff several years ago along her side of the alley, as previously located and traveled, on defendant's side of the alley. Defendant dug post holes for his east fence along this row of trees, and in doing so cut the roots of those trees. He extended the fence which he was constructing along his south line to this line, thereby cutting off access to the alley as previously located and traveled. Thereupon plaintiff brought this action in trespass and asked for an injunction restraining defendant from continuing the trespass. The trial court found that the alleged trespass was not committed on plaintiff's property and directed judgment for defendant. Plaintiff appealed from an order denying a new trial.

At the trial the controversy was whether the distance between Ash avenue and the railroad track was 75 feet or 100 feet. If 100 feet as claimed by defendant, the acts complained of were committed on his property; if only 75 feet, as claimed by plaintiff, a part of these acts

were committed on plaintiff's property. Both parties took the railroad track as the point from which to measure in locating the disputed lines, and neither of them caused any survey to be made for the purpose of locating such lines from the other monuments or fixed points shown on the plat.

From the record we take it as established and as practically conceded that the right of way is in fact only 75 feet wide on each side of the track. But defendant contends that the width marked on the plat is conclusive on the lot owners, and that they must locate their lot on the ground on the hypothesis that the right of way on the east side of the track is 100 feet in width as marked on the plat, although it is actually only 75 feet in width. We are unable to sustain this contention. It is thoroughly settled that, in locating lines and boundaries according to prior surveys, courses and distances must yield to monuments, fixed points, and the boundaries of adjoining lands established before the survey in question and shown on the plat or record thereof. Obert v. Board of Co. Commrs. of Otter Tail County, 122 Minn. 20, 141 N. W. 810; Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089; Lawler v. Counties of Rice and Goodhue, 147 Minn. 234, 180 N. W. 37; 4 R. C. L. 100.

It is admitted that the railroad still remains as it existed at the time of laying out the townsite. In his certificate indorsed on the plat, the surveyor states that the railroad is "the line upon which the townsite is laid out." This certificate gives the width of the streets and alleys, and the dimensions of the full lots, and states that the other lots are as exhibited on the plat, but says nothing concerning the width of the right of way. The plat shows that Ash avenue adjoins the right of way—the eastern boundary of the right of way forming the western boundary of the street. The plat, taken in connection with the surveyor's certificate, shows that the townsite was laid out with reference to the right of way, and, consequently, the courses and distances on the plat must yield to the true location and actual boundaries of the right of way as it in fact existed on the ground. It was a fixed and definite monument and must be given effect as such. It follows that the finding, to the effect that

defendant had committed no trespass on the property of plaintiff, is not sustained by the evidence, and the order denying a new trial is reversed.

ROSE EVERETT v. EMANUEL WALLIN.[1]

October 21, 1921.

No. 22,351.

Public land — reference of claim special agent not a pending contract.

1. Following the construction placed by the Federal decisions upon the proviso to section 7 of the act of March 3, 1891, relating to the issuance of patents for government lands, it is *held* that, after individual contests of a homestead entry had terminated, there was no pending contest of or protest against the entry, and that the reference of the entry by the land department to a special agent for investigation, did not amount to a contest or protest until a formal proceeding to cancel the entry was instituted by the United States.

Fraudulent entryman entitled to patent.

2. The fact that the entryman perpetrated a fraud upon the United States in making and establishing his entry, did not take the case out of the operation of the proviso, and, after the lapse of two years from the date of his final receipt, he was entitled to have a patent issued to him.

Action lies — equitable maxim does not apply to case.

3. Neither does that fact preclude plaintiff, who has succeeded to the rights of the entryman, from maintaining an action against defendant, to whom the patent was issued, to have the legal title to the land transferred to her. The maxim "he who comes into equity must come with clean hands," does not apply where a suitor asserts rights in land acquired from a third person by fraud at a time when defendant had no valid claim to the land and was himself a party to the fraud.

Action in the district court for Beltrami county to adjudge defendant the holder of the legal title of certain premises from the U. S. government in trust for plaintiff, and that he execute a deed thereof to

[1]Reported in 184 N. W. 958.

her. The case was tried before McClenahan, J., who made findings and ordered judgment in favor of plaintiff. From orders denying his motions for amended and additional findings and conclusions or for a new trial, defendant appealed. Affirmed.

Middleton & Middleton, for appellant.

Marshall A. Spooner, for respondent.

LEES, C.

By this action plaintiff seeks to have defendant adjudged to be the holder of the legal title to certain lands in trust for her and that he be required to execute a conveyance to her. The findings were in plaintiff's favor and defendant has appealed from an order denying his motion for a new trial.

These are the undisputed facts so far as material to the present litigation:

On November 12, 1903, one Peter Extram made a homestead entry upon which he offered commutation proof on August 6, 1906, and on August 17, 1906, obtained the receiver's final receipt and a certificate of final entry covering the lands in question. Extram and the defendant Wallin were fellow workmen, natives of Sweden and unfamiliar with our laws and in good faith agreed before the entry was made that Wallin should bear half the expense of making and perfecting the entry and obtaining title and that when title was obtained, Extram would convey a specified half of the land to Wallin.

Subsequently their agreement was reduced to writing and signed by both on December 10, 1903. Wallin carried out his part of the agreement and both parties made permanent improvements, each, on the portion of the land which was to be his under the terms of their agreement. We assume that the agreement was contrary to public policy and unenforceable. Anderson v. Carkins, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. ed. 272; Hafemann v. Gross, 199 U. S. 342, 26 Sup. Ct. 80, 50 L. ed. 220; Bailey v. Sanders, 228 U. S. 603, 33 Sup. Ct. 602, 57 L. ed. 985; St. Peter Co. v. Bunker, 5 Minn. 153 (192).

In making final proof Extram testified that he had not theretofore sold, conveyed or mortgaged any portion of the land, and Wallin, who

was one of his witnesses, testified that he was not interested in the claim.

August 22, 1906, Extram conveyed the entire tract to plaintiff. November 23, 1906, Wallin filed a contest affidavit, attacking Extram's entry on the ground that it was fraudulently made and established. The ground of the contest was that he, Wallin, at all times had an interest in the land under his contract with Extram.

December 11, 1906, the commissioner of the general land office rejected the application for leave to contest the entry, advising the Crookston land office where it had been filed, that the entry would be referred to a special agent for investigation. March 29, 1907, the secretary of the interior affirmed the commissioner's action, and repeated that the entry would be referred to a special agent. June 19, 1907, the case was closed, leaving the Extram entry intact. February 11, 1907, one Norton filed an application to contest the entry on substantially the same charges as Wallin had made. June 16, 1907, the commissioner directed the Crookston office to hold the contest in suspense pending an investigation of the entry in behalf of the government. June 3, 1908, the order suspending proceedings was revoked, and the Crookston office directed to hear the contest. Due notice of hearing was given, but Norton did not appear and finally on February 4, 1909, his contest was dismissed for want of prosecution. April 29, 1909, the case was closed and the Extram entry again held intact. December 24, 1908, one Severtson filed a third application to contest the entry on the same charges. April 29, 1909, it was denied on the ground that it was not made within two years after the final certificate was issued to Extram. May 22, 1909, a special government agent reported to the general land office that he had investigated the matter and found that Extram did not make the entry for his own benefit alone, but partly for Wallin's benefit, and that before making final proof he had agreed to convey part of the land to Wallin. June 14, 1909, the commissioner directed the Crookston office to proceed against the Extram entry upon the charges in the special agent's report. June 17, 1909, such proceedings were begun and after a hearing and on June 16, 1910, cancelation of the entry was recommended. April 17, 1911, the commissioner affirmed the action of the Crookston office, the secretary of the interior sustained the action on an

appeal to him, and on November 11, 1911, the Extram entry was finally canceled, no patent having ever been issued thereon. In making his ruling the secretary said:

"There is no ground for thinking that this entry is protected by the proviso to section 7 of the act of March 3, 1891. The Department is not disposed to construe that act as to hold that the Government is at any time bound to issue a patent upon entry or certificates procured by fraud or suppression of facts. But under no interpretation of the act does it apply to this entry."

Reference to the direction that the entry be investigated was then made and the secretary proceeded to say:

"The proceeding here is the result of that order, so that since March 29, 1907, within two years after the final certificate, the entry has been under investigation of the land department and this proceeding here is the result of that investigation instituted by order of the Department of March 29, 1907."

The proviso to section 7 referred to by the secretary reads:

"After the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead * * * laws * * * and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him." Section 5113, Comp. St. 1918.

May 21, 1914, Wallin made application to enter the lands at the Crookston office and the entry was accepted and on January 5, 1916, a patent was issued to him and duly recorded. Then plaintiff brought this action, on the theory that by virtue of the proviso to section 7 she became entitled to the patent when the Norton and Severton contests were finally disposed of and Extram's entry declared to be intact. As we read his answer Wallin defended, on the ground that Extram had never complied with the homestead laws and was not entitled to the receiver's final receipt or to a patent based thereon; that his entry was being contested at all times after November 23, 1906, until it was finally canceled. There were allegations of fraud on the part of plaintiff's husband and agent in procuring the conveyance from Extram, which we

do not regard as important. There was also an allegation of plaintiff's knowledge of the fraudulent character of Extram's entry.

The case was disposed of, on the theory that, after the three individual contests had been terminated and the entry held intact, there was no pending contest or protest until after the commencement of the formal proceeding by the government for the cancelation of the entry and that the reference of the matter to the special agent for investigation did not amount to a contest or protest within the meaning of the proviso. The proviso has been twice construed by the Supreme Court of the United States and the views of the learned trial judge harmonize with such construction: Lane v. Hoglund, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. ed. 1066; Payne v. United States, 254 U. S. 438, 41 Sup. Ct. 368, 65 L. ed. —. See also Jacob v. Harris, 42 Dec. Dept. Int. Pub. Lands, 611; Gildner v. Hall, 227 Fed. 704.

This construction entitled plaintiff as Extram's grantee to the patent issued to Wallin. In issuing it to him the land department misapplied the law and erroneously deprived plaintiff of the legal title, thus bringing the case within the rule stated in Clearwater County State Bank v. Ricke, 137 Minn. 438, 163 N. W. 793. The fact that Extram perpetrated a fraud upon the United States in obtaining the final receipt and certificate, is of no consequence, in view of the explicit holding in Payne v. United States, supra. At the end of two years after it was issued the land department had no jurisdiction to cancel the entry or withhold the patent. Authority to deal with any controversy over the validity of the entry, was then transferred to the courts, where the government might sue to cancel the entry or annul the patent had one been issued. Payne v. United States, supra. The right to bring suits of that nature is recognized both by statute and by repeated decisions of the Federal Supreme Court. Section 5114, U. S. Comp. St. 1918; Colorado Coal, etc., Co. v. United States, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. ed. 182; United States v. San Jacinto Tin Co. 125 U. S. 273, 8 Sup. Ct. 850, 31 L. ed. 747; J. J. McCaskill Co. v. United States, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. ed. 590; Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571, 62 L. ed. 1200.

Possibly the United States still retains such an interest in the land or

is under such a duty to Wallin as is sufficient to entitle the government to maintain a suit to cancel the entry for his benefit unless barred by the statute of limitations. Section 5114, supra. See United States v. San Jacinto Tin Co. supra; United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. ed. 121; United States v. Chicago Ry. Co. 116 Fed. 969, 972, 54 C.C.A. 545. That however is a matter in which action by the attorney general must be applied for and is something with which we are not concerned.

Whether in the present action defendant may attack plaintiff's title on the ground that the entry was a fraud upon the United States, is not open for consideration. The defense tendered by the answer was that plaintiff had been deprived of whatever title she got from Extram by virtue of the determination by the land department of the contests of his entry, and that, as a result, the land had been restored to the public domain and had again become subject to entry, so that defendant had gained the title by his subsequent entry and the issuance of the patent to him. This seems to have been the one defense relied on, and it was not good under the Federal decisions we have cited and are bound to follow.

Defendant urges that plaintiff cannot maintain this action because of the maxim that "he who comes into equity must come with clean hands."

It is not always easy to apply the maxim to a particular case. Of course it does not mean that a suitor shall have led a blameless life. Mr. Pomeroy says and many courts repeat his statement, that in general terms it means that he has been guilty of substantial misconduct in regard to or in connection with the matter in litigation, affecting in some measure the equitable relations subsisting between the two parties and arising out of the transaction involved. Pomeroy, Eq. Jur. § 399. The cases are collected and reviewed in an extended note to Langley v. Devlin, 4 A.L.R. 44. We think it clear that when one who has the legal title to land asks the aid of a court in vindicating his title against an adverse claimant, the latter cannot have him turned out of court because he got title by a fraud practiced upon the former owner, especially where as here the defendant himself was a party to the fraud. It may be said in the case at bar, as was observed in Teal v. Scandinavian-Am. Bank,

114 Minn. 435, 131 N. W. 486, that "plaintiff's hands in so far as concerns defendant are clean. * * * His (her) hands may perhaps be somewhat soiled as to others, but that fact does not inure to the benefit of defendant." It has been remarked that " 'clean hands' means a clear record with respect to the transaction with the defendant and not with respect to any third person." American Assn. v. Innis, 109 Ky. 595, 605, 60 S. W. 388. In that case it was held that the maxim could not be invoked by a junior patentee against a senior patentee on the ground that the senior patent was obtained by fraud. Another well considered case in point is Cochran Timber Co. v. Fisher, 190 Mich. 478, 157 N. W. 282, 4 A.L.R. 9. Plaintiff sued to remove a cloud upon its title arising from a deed to defendant from their common grantor. Defendant claimed that plaintiff had procured its deed by fraud. Defendant was the grantee in the second deed. The court was of the opinion that he was complaining of a fraud practiced upon his grantor at a time when he had no interest in the land and of which he was advised when he took his deed. It was held that the maxim had no application to such a situation. It was also held that the right of action for the fraud was personal to the grantor and not assignable, and in any event the deed to defendant did not purport to operate as an assignment of the grantor's personal right to sue for a cancelation of plaintiff's deed on the ground of fraud. The latter conclusion is well fortified by authority. See Graham v. Ry. Co. 102 U. S. 148, 154, 26 L. ed. 106; French v. Shotwell, 5 John. Ch. (N. Y.) 555, 565; Crocker v. Bellangee, 6 Wis. 645, 667, 70 Am. Dec. 489; Chicago v. Union Stockyards & Transit Co. 164 Ill. 224, 45 N. E. 430, 35 L.R.A. 281; Whitney v. Kelley, 94 Cal. 146, 29 Pac. 624, 15 L.R.A. 813, 28 Am. St. 106. Note to Marshall v. Means, 56 Am. Dec. 444; Stanek v. Libera, 73 Minn. 171, 75 N. W. 1124. It is not in conflict with the views expressed in Cornell v. Upper Michigan Land Co. 131 Minn. 337, 155 N. W. 99.

Granting that Extram perpetrated a fraud upon the government and that, under the doctrine of Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. ed. 1157, plaintiff stands in his shoes, we think the clear result of the cases cited is that defendant cannot resist the granting of equitable relief on the strength of the maxim he invokes.

Order affirmed.

STATE v. KENNETH DOLLIVER.[1]

October 21, 1921.

No. 22,363.

Criminal law — new trial when defendant did not get fair trial.

1. Though any one of several errors assigned would not in itself be sufficient ground for the reversal of a conviction in a criminal case, yet, if all of them taken together justify the conclusion that defendant was not accorded a fair trial, he is entitled to a new trial.

Limitation on character evidence.

2. The general rule is that character evidence should be confined in point of time to a period antedating the accusation of the defendant.

Issue of fact for jury irrespective of opinion of court.

3. In criminal prosecution the defendant has the constitutional right to have the facts determined by the jury uninfluenced by opinions from the bench.

When character evidence may raise reasonable doubt of guilt.

4. In such cases defendant has a right to introduce character evidence of moral qualities having a definite relation to the crime with which he is charged, and to have it considered by the jury as a fact in the case which, if established, tends to support the original presumption of innocence with which he is clothed. It may be sufficient of itself to engender a reasonable doubt of guilt.

Charge to jury error.

5. An instruction that the "good reputation of the defendant is not of itself a sufficient fact from which a reasonable doubt of guilt may arise," is erroneous, and the error is not cured by the further statement that such doubt must arise from all the testimony in the case.

Defendant was indicted by the grand jury of Faribault county charged with the crime of carnal knowledge of a female child under the age of 18 years, tried in the district court for that county before Dean, J., and a jury, and found guilty as charged in the indictment. From

[1]Reported in 184 N. W. 848.

an order denying his motion for a new trial, defendant appealed. Reversed.

Allen, Seifert & Allen, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham,* Assistant Attorney General, and *Henry J. Frundt,* County Attorney, for respondent.

LEES, C.

Defendant was indicted and convicted of the crime of having carnal knowledge of a girl 16 years of age, and has appealed from an order denying his motion for a new trial.

The complaining witness testified to facts which, if true, established defendant's guilt. He flatly denied the charge. Two witnesses called by the state testified that they had been riding in an automobile with the defendant and the complaining witness during the evening when the offense is alleged to have been committed, and that after they had alighted from the car on their return from the drive the defendant drove away accompanied only by the complaining witness. The act took place shortly thereafter according to her testimony. There was no other evidence bearing directly on the issue as to defendant's guilt or innocence. As part of his defense he offered in evidence an honorable discharge from the United States army some six months prior to the date of the offense charged. Among other things, it set forth that he was in the service from May 26, 1918, to February 3, 1919; that he was in the American Expeditionary Forces in France and participated in the engagements in the Argonne forest in September, 1918, where he received a wound in his right hand. It was certified that his character was excellent and that his services were honest and faithful. With some hesitation the court received the discharge in evidence, saying: "This seems to show that he has a good reputation for fighting, being a good fighter, a good soldier, but this is something entirely different from fighting. * * * It may be admitted though."

It is doubtful whether the discharge was admissible. People v. Eckman, 72 Cal. 582, 14 Pac. 359; Taylor v. State, 120 Ga. 857, 48 S. E. 361. But after it had been received the court took occasion to say in

charging the jury that, although the discharge was an honorable thing to have, "that of itself doesn't give a license to any young man to return and debauch a child or enter a home for the purpose of destroying it." So far as the record shows there was no occasion for such a statement. It was likely not only to overcome pretty effectually any weight the jury might have attached to the discharge as evidence of good character, but also to prejudice the defendant in their eyes as a man capable in the estimation of the court of the base conduct mentioned. If the defendant had no other ground for complaint we should not be inclined to reverse, but there are additional grounds. And the rule is that, where any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet, if all of them taken together justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of this court to reverse. State v. Briggs, 84 Minn. 357, 87 N. W. 935; State v. Almos, 122 Minn. 479, 142 N. W. 801.

Defendant produced several witnesses who testified that his reputation as a moral and law-abiding man was good. His counsel, in examining these witnesses, so framed the questions as to include the period which followed as well as that which preceded his indictment and arrest. Objection being made to such questions, the trial judge inquired whether counsel meant by them to cover defendant's reputation "now after he has been arrested and the case brought to trial?" Being answered in the affirmative the judge said: "The witness may answer the question, although I don't think it is competent." Each of the character witnesses was asked the same question. The county attorney repeatedly objected and the trial judge repeatedly addressd the same question to defendant's counsel and received the same answer, except on one occasion when, according to the record, the answer was "No." Exception being taken to the repetitions of his questions, the trial judge said that as framed by defendant's counsel the questions were not in proper form and added that some of the witnesses had testified that even after defendant's arrest his reputation was good. Counsel then inquired whether the court meant to express an opinion to the contrary and was answered thus: "None whatever, although there is more or less talk about it. I simply called the witnesses' attention to that fact

so that they could be advised of what they were answering. * * * The general rule of character testimony * * * should be up to the commission of the offense, or the arrest, and immediately previous to that."

Defendant took exception and now urges that the effect of the evidence as to defendant's good reputation was destroyed by these and other like questions and remarks of the trial judge. The general rule was correctly stated by the trial judge. 16 C. J. 581; 10 A.L.R. note 2, p. 9. But, since the witnesses were permitted to answer questions framed so broadly as to cover defendant's reputation up to the time of the trial, we cannot approve of the statements from the bench and particularly that there had been more or less talk about defendant's reputation. They tended to counteract the effect the character evidence might have had with the jury, and in criminal prosecutions the defendant has the constitutional right to have the facts determined by the jury uninfluenced by opinions from the bench. State v. Yates, 99 Minn. 461, 109 N. W. 1070. But defendant has a more serious cause for complaint in this connection.

In charging the jury on the subject of the character evidence in the case the court said: "The question of good reputation of the defendant is not of itself a sufficient fact from which a reasonable doubt of guilt may arise. Reasonable doubt of guilt must arise from all the testimony in the case." There was no other reference to the subject in the charge and no additional instructions were requested. The instruction given is open to the criticism that it would lead the jury to believe that evidence of good character may not of itself raise a reasonable doubt of guilt. The rule is that in all criminal actions the defendant may introduce evidence showing that he bore in the community where he lived a good reputation for moral qualities having a definite relation to the crime with which he is charged. Such evidence is received on the theory that a person possessing the moral qualities in question, would not be likely to commit the offense charged. It should be considered by the jury with all the other evidence in the case, in determining whether the witnesses who have testified to facts tending to criminate defendant have been mistaken or have testified falsely. 3 Greenleaf, Ev. § 25; People

v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Cancemi v. People, 16 N. Y. 501; People v. Elliott, 163 N. Y. 11, 57 N. E. 103; Com. v. Webster, 5 Cush. (Mass.) 295; United States v. Gunnell, 5 Mackey (D. C.) 196, 198; Edington v. United States, 164 U. S. 361, 17 Sup. Ct. 72, 41 L. ed. 467. It is admissible to support the original presumption of innocence. It is a fact in the case that may tend in a greater or less degree to establish innocence. It may be sufficient to establish a reasonable doubt of guilt. State v. Sauer, 38 Minn. 438, 38 N. W. 355; State v. Holmes, 65 Minn. 230, 68 N. W. 11. It goes to the probabilities of defendant's guilt and bears on the general question of guilty or not guilty. State v. Hutchison, 121 Minn. 405, 141 N. W. 483.

A man accused of the crime for which defendant was indicted is as good as convicted in the minds of many men even before he is tried. If he is of good character and if his reputation has hitherto been unblemished, these facts become his chief dependence in meeting and refuting the charge. Evidence thereof is substantive proof strengthening the presumption of innocence with which the law clothes him. True it is to be considered in connection with all the other evidence in the case, but it may be sufficient of itself to raise a reasonable doubt of guilt. Edginton v. United States, supra; People v. Garbutt, supra; Remsen v. People, 43 N. Y. 6, 9; Com. v. Aston, 227 Pa. 106, 75 Atl. 1017. See also A.L.R. 1017, note 7, p. 105; 103 Am. St. note p. 905.

We are of the opinion that the instruction given unduly restricted the effect of the character evidence and to his substantial prejudice deprived defendant of the benefit it would have been to him if the jury had been instructed as to its weight in accordance with the principles above stated. The order denying a new trial is therefore reversed.

MARTIN J. ALLEMAN v. DIRECTOR GENERAL OF RAILROADS OPERATING C. G. W. RY. CO. AND ANOTHER.[1]

October 21, 1921.

No. 22,382.

Nuisance — judgment notwithstanding verdict.

1. That notice to abate the nuisance for which plaintiff recovered damages was not given before suit, does not entitle defendant to judgment notwithstanding the verdict, where want of notice was not pleaded, and where defendant attempted to take no other advantage of the lack of proof of notice than by motion for a directed verdict. Defendant did not move for a dismissal or a new trial.

Appeal and error — judgment non obstante not granted on point not raised in trial court.

2. Judgment notwithstanding the verdict should not result to a party on appeal upon a ground not presented to the trial court either by the pleadings, or by the motion for directed verdict or by the motion for judgment.

Action in the district court for Mower county to recover $1,350 damages for flooding plaintiff's farm. The answer set up the statute of limitations. The case was tried before Catherwood, J., who when plaintiff rested and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $118.18. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendants appealed. Affirmed.

Briggs, Weyl & Briggs and *J. N. Nicholsen* for appellants.

Sasse & French, for respondent.

HOLT, J.

The appeal is from a judgment awarding plaintiff damages for the

[1]Reported in 184 N. W. 789.

flooding of his farm. The only ground upon which a reversal is asked is that the court erred in denying defendant's motion for judgment notwithstanding the verdict.

The right of way of defendant's railway extends through plaintiff's 140-acre farm. It runs nearly north and south. A public highway intersects the farm east and west, crossing the right of way by a viaduct under the track. The railway track is laid on a high embankment constructed in part from a borrow pit on the westerly side thereof. That part of the farm north of the highway and west of the right of way slopes toward the east, and the natural outlet for the drainage thereof is a ravine on the east side of the embankment. The claim is that some 18 rods north of the viaduct is the proper place for a culvert through the embankment; that the one existing further north is at too high a level, and as it now is the water held up by the embankment does not pass into the northerly culvert or over the viaduct until a large part of the field is flooded.

The complaint charged as the gist of the action that defendant negligently maintains the railway embankment, without providing a suitable outlet for the surface waters collected by it, thereby maintaining a continuous nuisance to plaintiff's damage. In addition to the general denial defendant's answer admitted ownership of the right of way, and alleged that the railroad was constructed thereon more than 25 years ago, and has been maintained as constructed up to the present time, and pleaded the statute of limitations as a bar.

Defendant rests the appeal on two propositions. The first is that, since it became the owner of the right of way after the construction of the railroad by another, it has not caused the nuisance and is not subject to suit without a previous notice to abate. It is true that a mere passive continuer of a nuisance created by another is entitled to notice before suit. Thornton v. Smith, 11 Minn. 1 (15); Bartlett v. Siman, 24 Minn. 448; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. 656. But no such defense was pleaded. And what is more, it is technical and perhaps goes more to an inadvertent defect in the proof, or to an omission to take a preliminary step prior to suit, than

to the merit of plaintiff's cause of action, and defendant should not have judgment. It has refrained from asking a new trial.

The second ground upon which defendant asks a reversal is: The evidence discloses that, after the railroad had been constructed in the shape it now is in, the then owner of the farm conveyed the right of way to defendant's grantor; hence, under the doctrine of Radke v. Minneapolis & St. L. Ry. Co. 41 Minn. 350, 43 N. W. 6, no claim can be made on account of any nuisance due to the manner in which the construction of the railroad interferes with the flow of surface waters. This defense was not pleaded, and the record does not indicate that such an issue was raised or litigated by consent or otherwise. Indeed quite the contrary, for neither the motion for a directed verdict nor the one for judgment non obstante was based upon the ground that plaintiff was concluded or barred by the conveyance of the right of way by the former owner of the farm to defendant's grantor, nor was any issue involving that proposition submitted to the jury.

We are of opinion that defendant should not now be permitted to urge that ground in this court for judgment in its favor on the merits. The Radke case was where a new trial was asked. In McCarty v. St. Paul, M. & M. Ry. Co. 31 Minn. 278, 17 N. W. 616, the defense now urged was pleaded. The record in this case leaves the impression that, had the issue now sought to be raised in this court been made and litigated, there would have been a question for the jury under the rule intimated in the Radke case as to the knowledge the grantor of the right of way had of conditions when the deed was delivered, and also whether or not the passages left for the water at that time have been since maintained in proper condition.

Judgment affirmed.

STATE EX REL. COMMON SCHOOL DISTRICT NO. 19 OF MOWER COUNTY AND OTHERS v. COUNTY OF MOWER AND OTHERS.[1]

October 17, 1921.

No. 22,412.

Extension of school district — statute construed.

1. Chapter 236, Laws 1919, conferring upon a school district the right to initiate proceedings before the board of county commissioners for the annexation of adjacent land to its district construed and *held* not an independent enactment on the subject matter thereof, but as supplementary to G. S. 1913, § 2677, as conferring the same right upon the school district as is there extended to the freeholders.

Act valid.

2. As so construed the act is not unconstitutional.

Right of appeal displaces certiorari.

3. G. S. 1913, § 2677, grants the right of appeal from orders made thereunder and certiorari is not available as a method of review; the right of appeal extends to proceedings initiated by a school district under chapter 236, Laws 1919.

Upon the relation of Common School District No. 19 of Mower county and others, the district court for that county granted its writ of certiorari to review the proceedings of the board of county commissioners changing the boundaries of certain school districts. The matter was heard by Catherwood, J., who quashed the writ. From an order affirming the order of the county board and quashing the writ, the relators appealed. Affirmed.

Sasse & French and *Parker & Gullickson,* for appellants.

J. N. Nicholsen and *Otto Baudler,* County Attorney, for respondents.

BROWN, C. J.

This proceeding for the change and alteration of the boundaries of

[1]Reported in 184 N. W. 791.

certain school districts in Mower county was brought before the board of county commissioners on the petition of school district No. 77, praying that certain land in an adjoining district be annexed to and made a part of the petitioning district, as authorized and provided for by G. S. 1913, § 2677. After due notice and hearing the prayer of the petition was granted, and an order attaching the land to district No. 77 made accordingly. Thereafter, on the application of certain taxpayers and property owners residing and owning property in the affected districts, a writ of certiorari was issued by the district court in review of the order so made. On return of the writ the matter was duly brought to a hearing, and after consideration thereof the court made an order discharging the writ and in all things affirming the order of the county board. From that order the objecting property owners appealed to this court.

The proceedings before the county board were instituted on the petition of school district No. 77, acting through its officers, under the authority conferred by the provisions of chapter 236, p. 232, Laws 1919. The question presented by the appeal is whether that statute has any application to the particular relief sought, namely, to annex to district No. 77 certain adjacent land situated in an adjoining district. We answer it in the affirmative.

The statute provides as follows:

"The school board of any school district in the state desiring to have land adjacent to or projecting into such district set off as and made a part of said district, may petition the board of county commissioners of the county in which such district is located, therein setting forth the name and kind of district involved, a description of the land in question, the name of the owner thereof, and the reasons for the request, which said board upon the receipt of such petition, shall give a notice of a hearing thereon as in other cases, and upon proof of the allegations in the petition, may make an order granting the same, and like notices of such change in the boundaries of such district shall be given as in other cases."

Although the statute on its face does not purport to be an amendment of or additional to the general statutes upon the same subject, G.

S. 1913, § 2677, et seq., its effect can be nothing other than supplementary thereto and to grant the right of petition to the school district to the same exent, within the limits of its express terms, as that statute grants and extends the right to the freeholders of the districts affected. The 1919 act clearly was not intended by the legislature as a separate and independent enactment on the subject; it is entirely too incomplete as a workable statute to justify the inference that the intention was that it should stand alone. And, moreover, the act itself requires the same procedure where the proceeding is instituted by a school district as when commenced on the petition of freeholders, or, as expressed therein, "as in other cases." No other like cases are provided for except in section 2677. And, as urged by counsel for respondent, the sole effect of the new statute was to authorize school districts to initiate proceedings for the additional coveted land to their authority and jurisdiction. It is in effect supplementary to or an enlargement of section 2677.

As so construed the act is not open to the constitutional objections urged against it by appellant. The subject matter of the statute is of purely legislative character, and no constitutional right of the citizen is thereby infringed. The prior statute has been sustained, and this must be also. Common School District No. 85 v. County of Renville, 141 Minn. 300, 170 N. W. 216. It is clearly competent for the legislature to declare the method and by whom proceedings of the kind may be commenced, and the right of initiation may be granted to one or more interested districts, as well as to individuals residing therein.

This conclusion renders unnecessary a discussion of the numerous points urged in support of the contention that the act of 1919 is unconstitutional and void. The suggestion that the act was intended to cover a special situation, and to apply to a single tract of land, conditions not coming within the terms of the general statute, is not without force. But it should not prevail. The subject matter of the act is substantially that of the general statute, and nothing materially new is found in the act of 1919. That the land here sought to be attached to district No. 77 comes within both enactments seems clear. State v. Village of Gilbert, 107 Minn. 364, 120 N. W. 528; Hobart v. City of Minneapolis,

139 Minn. 368, 166 N. W. 411; State v. Village of Kinney, 146 Minn. 311, 178 N. W. 815.

This covers the case and all that need be said in disposing of the appeal, except to call attention to the fact that the order made by the county board could have been reviewed by appeal, as given by section 2677. With that remedy present certiorari is not available. The parties, however, treated the act of 1919 as an independent enactment, and, since no appeal is there given, resorted to the remedy by certiorari. In this situation we have disposed of the case on the merits, but call attention to the existence of the right of appeal, as we construe the statute, for future guidance in similar proceedings.

Order affirmed.

IN THE MATTER OF THE ASSESSMENT FOR PAVING UNIVERSITY AVENUE.

PITTSBURGH COAL COMPANY v. CITY OF ST. PAUL.[1]

October 21, 1921.

No. 22,435.

City of St. Paul — assessment for paving valid — charter amendment.

1. On May 27, 1920, the council of St. Paul made a final order for paving a street in a proceeding instituted and carried on pursuant to the provisions of the city charter. Prior to November 27, 1920, it was completed, and on that day the commissioner of finance reported a preliminary assessment, which was on the same day approved by the council, and on December 29, 1920, after a notice of a public hearing the assessment was ratified by the council and was certified to the district court for confirmation, and was confirmed on March 24, 1921. At the November 2, 1920, general election, an amendment to the charter was adopted, effective 30 days thereafter, limiting assessments against abutting property for paving to the cost of a strip of pavement 12 feet wide adjacent to the property, the rest to be paid by the city. *Held*, that the assessment was properly levied in accordance with the provisions of the charter prior to the amendment becoming effective.

[1]Reported in 184 N. W. 788.

Cost of paving street intersections.

2. The provision of section 235 of the charter, to the effect that the council may pay the cost of paving street intersections out of the general funds of the city, is permissive, not mandatory.

In the district court for Ramsey County the Pittsburgh Coal Company filed objections to a paving assessment. The matter was heard by Dickson, J., who made findings that the assessment was in all things conformable to law and the provisions of the charter of the city, and confirmed the assessment. From the judgment entered pursuant to the order for judgment, the Pittsburgh Coal Company appealed. Affirmed.

O. H. O'Neill, Milton P. Firestone and *Samuel Lipschultz,* for appellant.

Arthur E. Nelson and *C. F. McNally,* for respondent.

DIBELL, J.

The Pittsburgh Coal Company appeals from the judgment of the Ramsey district court confirming an assessment against its property for the improvement of University avenue in St. Paul.

The assessment was made under the home rule charter of the city (sections 233-257). On May 13, 1919, the city council made a final order for the improvement. On November 27, 1920, the commissioner of finance reported a preliminary assessment to the common council. On the same day the council approved it. On December 29, 1920, at the time fixed for a public hearing, the council ratified it and certified it to the district court for confirmation, and it was confirmed on March 24, 1921. These proceedings were had in compliance with the charter as it stood prior to the going into effect of an amendment to section 235 of the charter adopted at the November 2, 1920, general election, and effective 30 days after that date. This amendment added the following proviso:

"Provided, further, that the amount which may be assessed against abutting property for paving any street, boulevard, parkway or other highway shall not exceed the cost of a strip of such pavement twelve feet wide adjacent to the property thus assessed. The cost of the pavement over and above the amount assessed against all property benefited

shall be paid out of the city revenue or from money raised by bond issue or both."

This proviso was in effect at the time of the formal ratification by the common council on December 27, 1920, and at the time of the confirmation by the district court by the judgment from which this appeal is taken. Before the going into effect of the amendment the work was completed. What was done by the council and by the court in reviewing and confirming the assessment was what would have been done in regular course if the amendment of November 2 had not been adopted. The contention of the coal company is that, upon the amendment becoming effective 30 days after the election, the assessment could not exceed the amount thereby prescribed. We are not of that opinion. Our view is that the improvement, and the assessment for it, had proceeded so far at the time of the going into effect of the amendment that the assessment should be levied in accordance with the charter as it was before the amendment. We do not hold that the date of the passing of the final order is the determining date. That question is not before us. Our holding is that, with the improvement completed and the assessment so far in progress as it was when the amendment was adopted, it should be made in accordance with the charter as it was before the amendment.

Counsel have filed helpful briefs in connection with their oral arguments. It is unnecessary to discuss the authorities. The question is finally one of construction.

2. The coal company further claims that under section 235 of the charter the city must pay the cost of paving street intersections. This section provides that nothing contained in it shall prevent the council from paying the cost of street intersections out of the general funds of the city. We do not construe the language as mandatory. It is permissive.

Judgment affirmed.

H. W. WHITE INVESTMENT COMPANY v. CHARLES D. KELSO.[1]

October 21, 1921.

No. 22,513.

Broker — cash sale — offer to assume mortgage.

A broker, authorized by his principal to sell for cash at a specified price, does not earn his commission by procuring a purchaser at the price asked, who proposes to assume a mortgage upon the property and pay the difference in cash.

Action in the municipal court of Minneapolis to recover $275 as broker's commission for selling real estate. The answer alleged that, before any satisfactory terms had been offered to defendant on behalf of any purchaser by the plaintiff, defendant canceled the agreement by notice that the property had been taken off sale and would not be sold on any terms. The case was tried before Reed, J., who when plaintiff rested denied defendant's motion to dismiss, and at the close of the testimony denied defendant's motion for a directed verdict and granted plaintiff's motion for a directed verdict. From an order denying his motion for a new trial, defendant appealed. Reversed.

Arthur Le Sueur, for appellant.

Robert M. Crounse, for respondent.

DIBELL, J.

Action by a real estate broker to recover commission. The court directed a verdict for the plaintiff. The defendant appeals from the order denying his motion for a new trial.

The defendant listed with the plaintiff, a real estate broker, a piece of property in Minneapolis for sale for cash for $6,000. The plaintiff procured a purchaser who offered to assume a mortgage of $2,700, and

[1]Reported in 184 N. W. 790.

pay the balance of $3,300 in cash. The defendant declined the offer. The terms offered by the purchaser were not those upon which the defendant authorized his broker to sell. It may be material to the seller that he have all cash instead of part cash and an assumption of a mortgage. Anyway, the terms of sale required all cash. That a broker, to earn his commission, must procure a purchaser ready to purchase on the terms which he is authorized by the owner to offer, is fundamental. Bergh v. Stanek, supra, page 73, 184 N. W. 371. This the plaintiff did not do.

Order reversed.

CITY OF ST. PAUL v. MAUDE HARRIS.[1]

October 28, 1921.

No. 22,250.

Keeping disorderly house — no attack on defendant's character, when.

The character of the defendant in a criminal prosecution cannot be attacked, until he puts it in issue by offering evidence of good character, and this rule applies, although the offense charged is the keeping of a disorderly house.

Defendant was charged with the crime of keeping a house of ill-fame, tried in the municipal court of St. Paul before Finehout, J., and a jury, and found guilty as charged in the indictment. From the judgment and sentence defendant appealed. Reversed.

Gustavus Loevinger, for appellant.

Arthur E. Nelson and *Eugene M. O'Neill,* for respondent.

TAYLOR, C.

Defendant appeals from a judgment of the municipal court of the city of St. Paul convicting her of the offense of keeping a disorderly house.

[1]Reported in 184 N. W. 840.

At the trial the prosecution was permitted to present evidence tending to prove the bad reputation of the defendant as a part of its case in chief. This is urged as reversible error.

No rule of criminal law is more thoroughly established than the rule that the character of the defendant cannot be attacked, until he himself puts it in issue by offering evidence of his good character. This rule was considered and applied in the recent case of State v. Nelson, 148 Minn. 285, 181 N. W. 850, where the authorities were considered and the reason for the rule indicated. The state concedes that such is the general rule, but insists that prosecutions for keeping a disorderly house or house of ill-fame are excepted from this rule. There is authority to that effect, but the weight of authority is to the contrary. 18 C. J. 1268, and cases there cited; 4 Enc. of Ev. 728. As there must be a new trial for the error in admitting this evidence, the other questions require no extended consideration. We will merely remark that evidence as to the reputation of the place and of the persons who frequented it was competent, State v. Smith, 29 Minn. 193, 12 N. W. 524; State v. Terrett, 131 Minn. 349, 154 N. W. 1073; State v. Rogers, 145 Minn. 303, 177 N. W. 358, and that there was sufficient evidence to sustain the verdict.

The judgment is reversed and a new trial granted.

MICHAEL LINNEHAN, JR. v. MARTIN J. SHEERAN.[1]

October 28, 1921.

No. 22,283.

Slander — when charge against third person is admissible to show malice. Evidence of a slander uttered by defendant against a third person in no way connected with the suit, is generally inadmissible, but it is admissible to show malice, if the defamatory words contain the same implication as those sued upon, relate to a transaction in which plaintiff and the third person were equally concerned and by innuendo charge both with the crime of larceny committed by them jointly.

[1]Reported in 184 N. W. 835.

Action in the district court for Waseca county to recover $7,500 for slander. The answer denied the slanderous words. The case was tried before Childress, J., and a jury which returned a verdict for $100. Defendant's motion for judgment notwithstanding the verdict was denied, and on rehearing his motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Henry M. Gallagher, for appellant.

Moonan & Moonan, for respondent.

LEES, C.

This is an action for slander which resulted in a verdict for plaintiff. Defendant has appealed from an order denying his motion for a new trial.

The defendant and the plaintiff and his brother Dan are neighboring farmers. The Linnehan brothers live on and work their father's farm. In the fall of 1916 they lost some calves. Hearing there was a stray calf on the premises of a neighbor named Bluhm, they went there to see whether it was theirs and were directed by Bluhm to go to his pasture where he said they would find a stray calf running with his own. They went, found a calf which they picked out from the others and took with them, claiming it belonged to them. Bluhm consented to their taking it. Defendant had likewise lost some calves and he too went to Bluhm's place in search of them and learned that the Linnehans had been there and taken a calf away. Thereupon he went to their farm to see it. Plaintiff had marked it by splitting or clipping its ear. Seeing this, defendant told him that he had his calf and had stolen it and went to the county attorney to have him arrested. The county attorney refused to issue a criminal complaint, and the defendant commenced a replevin action in the municipal court of Waseca to get possession of the calf. The animal was rebonded and the Linnehans retained possession. While the replevin action was pending defendant's brother-in-law and one of his neighbors interceded to bring about a settlement. Their efforts were successful, defendant dismissing the action and leaving the calf with the Linnehans, on condition that they pay the costs he had incurred. Plain-

tiff paid $29 as such costs. The value of the calf according to the defendant was only $13.

After that defendant met the Linnehans from time to time and twitted them about the calf. On one occasion at the village store he said to Dan Linnehan: "Did you see any calves tonight?" At another time he said to plaintiff: "This is a pretty cold night to be clipping ears," and at another: "Hello, old calf nipper." This last remark provoked a fight between the two men. Defendant admitted that he had made the remarks above set out and that they referred to the calf incident. He also admitted that he had no love for the Linnehans and intended to charge plaintiff with having taken his calf.

A witness for plaintiff testified that at the village of Waldorf in May, 1917, following the fight between the parties, he heard defendant say to plaintiff that he was a calf thief and he could prove it and that there were quite a number of persons present at the time. Dan Linnehan was a witness for his brother and was asked this question on his direct examination: "Did you meet him (defendant) at any time * * * subsequent to the settlement when he referred to * * * calf nipping or calf picking?" Objection was made and overruled and defendant excepted. The answer was "yes." When asked what defendant said the witness replied: "He called me a calf picker." Before cross-examining the witness defendant's counsel moved that this evidence be stricken, on the ground that the language, if used, did not refer to plaintiff, but to one not a party to the action. Plaintiff's counsel stated that it was offered to show defendant's state of mind as to both brothers; that they had gone together to get the calf and were working the farm together where it was taken and kept. The motion to strike was denied. No exception was taken, but in his motion for a new trial defendant specified as error the court's refusal to strike this evidence. Solely because of alleged error in these rulings, the defendant asks us to reverse the order denying him a new trial.

There is some doubt whether the state of the record and the assignments of error are such as to present the question raised, but we will treat it as before us for determination on the merits.

Counsel for defendant is undoubtedly correct in saying that it is er-

ror to permit the plaintiff in a slander case to prove that defendant slandered third persons, whether or not the defamatory language used was similar to that spoken of the plaintiff. The rule is thus stated in Newell, Slander & Libel, § 972: Evidence of slanders uttered by defendant against third persons in no way connected with the suit, is inadmissible, for the reason that it is contrary to the established rule of the common law that one cannot be proved guilty of the offense for which he is on trial by showing that at another time he committed the same offense. Cochran v. Butterfield, 18 N. H. 115, 45 Am. Dec. 363, and Sullivan v. O'Leary, 146 Mass. 322, 15 N. E. 775, are cited as and are ample authority for the statement in the text, if a proposition so plain needs support by adjudged cases. But, if the slander relates to a person connected with the plaintiff in the identical transaction which gave rise to defendant's defamatory statements, a different situation is presented. Defamatory language may be used with reference to two persons, as, for example, partners or members of the same family, and may relate to a subject with which both were connected. If an action is brought by one, although the language was addressed to or spoken of the other, may it not be put in evidence as tending to show the animus of defendant toward both?

Here defendant was repeating the charge that he had been deprived of his property by the joint acts of plaintiff and his brother. If one was a thief, so was the other. Without discriminating between them, he directly or indirectly accused each of stealing. His utterances referred to the same transaction in which both were equally concerned. The defamatory words contained the same implication as those sued upon, related to the same subject and were repetitions of the same accusation. In defendant's mind the two brothers were joint wrongdoers, and the jury might well find that the ill-will, manifested by his remarks to and concerning one, extended equally to the other. In no proper sense was Dan Linnehan a third person in no way connected with the slander which was the basis of the action, and hence we conclude that the evidence under consideration does not fall within the scope of the general rule above stated. Our conclusion is supported to some extent by the following cases: Gribble v. Pioneer Press Co. 34 Minn. 342,

25 N. W. 710; Larrabee v. Minnesota Tribune Co. 36 Minn. 141, 30 N. W. 462; Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 388; Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260. See also Newby v. Times Mirror Co. (Cal. App.) 188 Pac. 1008-1016 and Meriwether v. Knapp & Co. 211 Mo. 199, 109 S. W. 750, 16 L.R.A.(N.S.) 953-959. The order appealed from is therefore affirmed.

A. W. BONDERSON v. ROLF HOVDE AND H. L. GODS.[1]

October 28, 1921.

No. 22,299.

Physician and surgeon — verdict sustained by evidence.

1. The evidence sustains the jury's finding that a patient sustained injury through negligent treatment on the part of defendants.

Verdict not excessive.

2. The damages are not excessive.

Charge to jury.

3. The charge is not open to the objection that it permits recovery for injury other than that caused by the negligence of defendants.

Cross-examination of medical experts.

4. Wide latitude should be allowed on cross-examination of medical experts. The extent of the examination is largely in the discretion of the court. It is not reversible error to refuse to permit counsel on cross-examination to elicit an opinion based on an assumption of facts as claimed by him but not in evidence.

Reading reporter's notes of evidence at request of jury.

5. It is not error to permit the court reporter, at the request of the jury, to read from his notes of evidence, when the permission is exercised with fairness. There was no reversible error in this case in permitting the reporter to read evidence not pertinent to the point as to which the jury had made inquiry.

[1]Reported in 184 N. W. 853.

Actions in the district court for Sibley county, one to recover $10,000 for malpractice and the other to recover $445.95 for medical attendance, hospital fees and other expenses incidental to the treatment of plaintiff's minor child. The answers alleged that the professional treatment was rendered with due skill and care. The cases were tried together before Tifft, J., and a jury which returned a verdict for $5,000 in the malpractice case and for $400 in the other case. From an order denying their motion for a new trial, defendants appealed. Affirmed.

Dille, Hoke, Krause & Faegre, for appellants.

George A. & C.-H. MacKenzie and *P. W. Morrison,* for respondent.

HALLAM, J.

In September, 1919, plaintiff's fourteen-year-old daughter, Hazel, fell from an apple tree and sustained a fracture of the left arm near the wrist. She was taken to defendants, who are physicians and surgeons, for treatment. They examined her, reduced the fracture and put the arm in splints. She went to them for treatment from time to time during a period of about three weeks, consulting mostly with defendant Hovde. Then it developed that there were sores under the bandages and that a septic condition had set in. There was dead tissue and part of the bone was dead. Hazel thereupon received treatment from other physicians and surgeons, namely, Dr. Olson of Gaylord and Dr. Fritchie of New Ulm. As a result of the diseased condition that developed, the hand and part of the arm are deformed and Hazel has suffered permanent loss of much of the use of them. This action is brought to recover damages on the theory of malpractice. Plaintiff had a verdict for $5,000 and defendants appeal.

1. The first contention is that the evidence does not sustain the verdict. The evidence is in conflict. The claim of plaintiff is that the bandages placed on the arm by defendants were wrapped too tightly, that she complained of this from time to time, but that defendants told her it was all right. There is expert medical testimony to the effect that the tight wrapping of the bandages was a cause of the diseased condition of the arm. There are some inconsistencies in the testimony of

the witnesses for the plaintiff, and the evidence is far from conclusive, but we regard it as sufficient to sustain the jury's findings.

2. Claim is made that the damages are excessive, and in this connection it is contended that there is no proof that the loss of the portion of the bone was due to the tight bandages. We need not stop to consider whether or not the evidence contains sufficient proof on this point, for, aside from the loss of the bone, the condition of the arm is such that if liability exists at all, a verdict for $5,000 is not excessive.

3. Exception is taken to the instruction of the court that "if he is entitled to recover at all, he is entitled to recover to the extent of the injuries sustained by the child." The contention is that this permits recovery against defendants for the broken arm as well as for the alleged malpractice. The charge commences with an instruction that the action is to recover damages for the injury "alleged to be due to and caused by the negligence of the defendant," and then advises the jury that "it is the claim of the plaintiff that defendant did not properly or correctly treat the fracture," and in substance that the claim was that the effect of the treatment was to cause the necrosis or decaying and that the defendants were negligent. Then the court gave the instruction complained of and further charged the jury that they could "give no damages for any pain or suffering of the child before such time as she was attended by the defendants." We think the jury would understand from the whole charge that the only damages they could take into consideration were those resulting from the alleged negligence of defendants.

4. Plaintiff called medical experts to give opinion evidence as to the cause of the diseased condition of the arm based upon assumption of facts as shown by the testimony on behalf of plaintiff. On cross-examination defendant's counsel sought to elicit an opinion from these witnesses, based on an assumption of facts as claimed by the defendants. The facts assumed were not then in evidence. The court rejected this testimony. This is assigned as error. We think there was no reversible error. We fully agree with counsel for defendants that wide latitude should be allowed on cross-examination of medical experts, and it is altogether probable that if the court had permitted the cross-examina-

tion there would have been no reversible error. Counsel may even be permitted on cross-examination, for the purpose of testing the skill and accuracy of the expert witnesses, to ask hypothetical questions pertinent to the inquiry, assuming facts having no foundation in the evidence. Williams v. Great Northern Ry. Co. 68 Minn. 55, 70 N. W. 860, 37 L.R.A. 199. But the range of such cross-examination must rest largely in the discretion of the trial court, and we think there was no abuse of discretion in this case.

5. After the jury retired and after they had considered the case for some time, they returned to the court room and asked what Dr. Olson had testified as to the kind of bandage the child had on when she first visited his office. The court told the court reporter to read Dr. Olson's testimony on that point to the jury and this was done. However, there was some conflict between the testimony of Dr. Olson and Hazel on that point and the court said: "I think it is only fair to read the testimony of the girl in reference to the bandage at that time." The reporter evidently did not find the testimony of Hazel on this point. He read somewhat from her testimony, but read nothing on this point. The court then asked that the testimony of Dr. Hovde on this point be read and this was done. Counsel for defendants strenuously contend that the court committed error.

It is contended that it is error to permit the reading by the reporter of any testimony to the jury without the consent of the parties. We do not agree with this contention. This practice is so common and sometimes so necessary to enlighten the jury that we should encourage rather than discourage it, when permitted with such an exercise of fairness as was exhibited by the court in this case. We find nothing in G. S. 1913, § 7803, inconsistent with this rule. That section relates to the papers which the jury may take into the jury room.

It is further contended that it was error to read the testimony of Hazel bearing on other features of the case. There was no occasion for reading the testimony, but we think the reading of it was not prejudicial. There was really little dispute as to the facts stated in the testimony read.

Order affirmed.

S. A. SIVERTS v. EUNICE DAHOOT.[1]

October 28, 1921.

No. 22,339.

Judgment notwithstanding verdict.

1. Plaintiff was not entitled to judgment notwithstanding the verdict.

Reasonable value of services rendered.

2. It was error to submit the reasonable value of services rendered, for there was no evidence as to such value, and the only proof in respect to the services was that they were rendered under an express contract at a stipulated price.

Verdict perverse.

3. A verdict, based upon an express contract, for about one-third of the amount which should have been awarded if the contract had existence, must be regarded as perverse, and should not be allowed to stand, following Alden v. Sacramento Fruit Lands Co. 137 Minn. 161.

Action in the district court for Morrison county to recover $1,900 upon 11 promissory notes. Defendant in his amended answer set up a counterclaim for $3,650. The case was tried before Roeser, J., who at the close of the testimony denied defendant's motions for a directed verdict and a jury which returned a verdict in favor of defendant for $1,300. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Reversed.

E. A. Kling and *W. H. Cherry,* for appellant.

D. M. Cameron, for respondent.

HOLT, J.

Plaintiff sued upon 11 promissory notes executed by defendant, aggregating $1,900 and interest. Defendant answered that the notes were executed without consideration and for the sole accommodation of plain-

[1]Reported in 184 N. W. 839.

tiff, and set up as a counterclaim that he had worked for plaintiff during the years 1912 to and including 1918 at the agreed price and reasonable value of $1,200 for each year, and for the sum of $100 during 1919, and there was due and unpaid $3,650 and interest. A verdict for $1,300 was rendered in favor of defendant. Plaintiff's motion for judgment or a new trial was denied, and he appeals.

Defendant, a native of Kurdistan, Turkey, came to this country in his youth, and finally settled down in Morris, Minnesota, about 1900. Soon thereafter he became the owner of a team and engaged in draying until 1908 or 1909, when he entered the ice business, conducting it under the name of City Ice Company. He bought a lot for an ice house, put up and retailed ice. He was wholly illiterate, and procured plaintiff, a banker at Morris, to keep whatever books were necessary in the business. Plaintiff's bank also loaned him the money he needed. This admittedly kept on until 1912, and, so far as any one else knew, until the fall of 1919, when a controversy arose between the parties. In the answer and upon the trial defendant asserted that in January, 1912, he sold the ice business to plaintiff and was then hired by plaintiff to run it for him, and to do this in defendant's name, precisely as theretofore, his wages to be $100 per month; that under this arrangement defendant worked for plaintiff until the fall of 1917, when he bought an ice business in Little Falls, and that from that time on he was to receive $100 a year for letting plaintiff carry on the ice business ostensibly as that of defendant. We shall not discuss the remarkable story of defendant as to the ownership of the ice business at Morris from January, 1912, to the fall of 1919, for we are of opinion that, under the testimony, it became a jury question, and hence there was no error in denying the motion for judgment notwithstanding the verdict.

We, however, deem the verdict perverse and not justified by the evidence. That it is such is due in part perhaps to an error in the charge, The counterclaim averred the wages to be of the agreed price and reasonable value of $100 per month. There was no evidence whatever of the value of the services. Indeed, there was no room for an implied contract, either as to employment or compensation. The testimony of defendant alone supported his counterclaim, and that was that there

was an express contract of hiring at stipulated monthly wages. "An express contract necessarily excludes a contemporaneous implied one in relation to the same matter." Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L.R.A. 52. Under this state of the evidence it was error for the court to charge the jury that a verdict might be given defendant for the reasonable value of his services, if they found no agreement for a specified salary. That the pleading alleged a reasonable value of the services did not justify a recovery on that basis, unless there was evidence of such value.

In addition to the error in the charge affecting the verdict, it is perverse and irreconcilable with the evidence. There could be no offsetting of claims in this case. If plaintiff's notes were the valid obligations of defendant, the whole counterclaim must be rejected. And, if defendant was justly entitled to compensation for services, it must follow that plaintiff and not defendant was operating the ice business, and no recovery could be had on any of the notes sued on which were issued for carrying on that business. Defendant's wages for six years at $100 per month would amount to $7,200, and for two years more at $100 a year would make a total of $7,400. The answer avers payment to the amount of $3,750, leaving a balance due of $3,650 and interest. It is not certain just what date in the fall of 1917 defendant left Morris and started the ice business at Little Falls, but the jury would not be justified in reducing the principal sum asked for more than two or three hundred dollars. The interest, which the court instructed the jury to give if the verdict was for defendant, would amount to over $1,000, so that about $4,650 was the lowest amount for which a verdict could have been rendered for defendant. The verdict returned was for $1,300.

The argument is made that plaintiff should not be heard to complain since he is not prejudiced. The argument is not sound. The verdict does not respond to the evidence of either party. As well said by Justice Dibell in the case of Alden v. Sacramento Fruit Lands Co. 137 Minn. 161, 163 N. W. 133: "The jury compromised, not on the question whether there was a contract between the parties, nor upon what it was, nor upon what the recovery on the contract basis should be, but between the right of recovery and its amount. This compromise was

a sacrifice of the very principle upon which a proper recovery rested. Neither the plaintiff nor the defendant had the fair judgment of the whole jury upon all the issues." In that case the jury awarded about one-half of what the evidence indicated as proper; if any award at all should have been made in the instant case, it is about one-third of the correct amount.

Insofar as the order denied a new trial it is reversed and a new trial granted.

LAURA LARSON AND ANOTHER v. STEVEN A. TRAGESER.[1]

October 28, 1921.

No. 22,340.

Workmen's Compensation Act — relation of employer and employe.

1. Section 8205 of the Workmen's Compensation Act (G. S. 1913) creates a definite and fixed status of employer and employe with reference to the act, not a mere rebuttable presumption of evidence, and provides a method by which either may avoid the same.

Relation can be avoided.

2. The method so prescribed for avoiding the status thus created, and keeping without the act, is exclusive of all others and must be in writing as there required.

Parol understanding inadmissible.

3. Evidence of a parol agreement or understanding between the employer and employe that either or both should be excluded from the act and not bound thereby, is inadmissible, because not the form of exclusion permitted by the act.

Upon the relation of Steven A. Trageser the supreme court granted its writ of certiorari directed to the district court for Lyon county and the Honorable I. M. Olsen, judge thereof, to review the proceedings in that court under the Workmen's Compensation Act brought by de-

[1]Reported in 184 N. W. 833.

pendent minor children of Christ N. Larson, employe, against relator, as employer. Affirmed.

James H. Hall, for plaintiffs.

Mathews & Mathews, for defendant relator.

BROWN, C. J.

Certiorari to review a judgment in proceedings under the Workmen's Compensation Act.

The facts are not in dispute. Christ N. Larson was in the employ of defendant at his gasolene filling station, located in the village of Cottonwood, this state, and while engaged in the work of his employment was instantly killed by the explosion of a gasolene tank situated on the premises. He left surviving as his next of kin two minor daughters who were dependent upon him for support. The proceeding was instituted in their behalf to recover the compensation given by the statute in such cases. The sole defense interposed at the trial below was that the decedent was not within the protection of the compensation act, therefore that no recovery could be had. In support of the defense defendant offered to show a parol understanding between defendant and decedent that the compensation act should not apply to decedent under the employment; that decedent, at the time the contract of employment was entered into, expressly declared that it was against his religion to accept insurance or indemnity of the kind and would not enter defendant's services if the statute applied. The evidence so offered further shows an acquiescence in decedent's position, and the acceptance of his services on the conditions imposed. There was no writing of any kind expressing that understanding, or other compliance with the pertinent provisions of the statute on the subject. The trial court rejected the evidence to which exception was noted.

In our view of the question the ruling of the learned trial court was right. Section 8205, G. S. 1913, the section of the compensation act relating to and dealing with the subject, is definite and specific as to what employers and employes shall be bound by the act, and includes all contracts of employment entered into subsequent to the enactment of the statute. It declares that all contracts of employment thereafter

made shall be presumed to have been made with reference and subject to the provisions of part 2 of the act, unless otherwise expressly stated in the contract, in writing, or unless written or printed notice is given by either party to the other as therein provided that he does not accept the provisions of the act. The pertinent provisions as relating to the employe who desires to keep without the act, where he is not excluded by a written contract of employment are as follows:

"The employe shall give written or printed notice to the employer of his election not to be bound by part 2, and file a duplicate with proof of service attached thereto with the labor commissioner."

These provisions make it clear that the legislature intended to establish one definite and certain method of removing either employer or employe from the act, or indicating a purpose or intention not to be bound thereby, and the requirement that the intention be expressed in writing must be construed, in furtherance of the legislative intent, as furnishing the exclusive method of accomplishing that end. The contention of counsel for defendant, urged with much ingenuity, that the statute merely creates a presumption applicable to all employes and employers, not expressly excepted, subject to rebuttal and to be overcome by the ordinary methods of proof, is out of harmony with the purpose of the law and cannot be sustained. To permit a parol exclusion or withdrawal by employer or employe, would be destructive of the act, open the door to untold litigation involving parol controversies as to its application, and throw the administration thereof and of the rights of parties thereunder into confusion; conditions and situations it was the manifest purpose of the legislature to guard against and prevent by requiring all elections not to be bound by the act to be in writing. We so construe and apply the statute.

The case of Thorpe v. Pennock Mercantile Co. 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229, is not in point. There a rebuttal presumption of fact was involved, with no statute, as in the case at bar declaring in what manner or form it might be overcome. Here the statute creates and presumes a particular status of employer and employe with reference to the compensation act and declares a definite method of withdrawing therefrom. In that situation the statutory remedy is exclusive.

City of Faribault v. Misener, 20 Minn. 347 (396); Abel v. City of Minneapolis, 68 Minn. 89, 70 N. W. 851.

This view is supported by the general rules of law on the subject and expressly by the decision in Dusha v. Virginia & Rainy Lake Co. 145 Minn. 171, 176 N. W. 482. There the statute prohibited the employment of children under 16 years of age in dangerous employments, and imposed a penalty for a violation thereof, with the express exception that the employer should not be deemed to have violated the statute, though he in fact may have employed a child under age, if he obtained and kept on file an affidavit of the parent or guardian to the effect that the child when employed was not under the prohibited age. It was there held that the affidavit was the exclusive defense to the charge of a violation of the statute, and that parol declarations of the parents that the child was over 16 were inadmissible. The rule no doubt would be different in the absence of a specific statute prescribing a definite method of relief.

Judgment affirmed.

C. A. HOLLISTER, ADMINISTRATOR OF THE ESTATE OF ALICE HOLLISTER, DECEASED v. WALKER D. HINES, DIRECTOR GENERAL OF RAILWAYS, AND ANOTHER.[1]

October 28, 1921.

No. 22,387.

When charge to jury is reversible error.

1. Submitting to the jury a ground for recovery not justified by the evidence is reversible error.

Railway — failure to provide gates or flagman at crossing.

2. Unless required by some statutory enactment, a railway company is not negligent in failing to provide gates, or a flagman or other warning device at an ordinary crossing.

[1]Reported in 184 N. W. 856.

Question for jury whether hazardous crossing should be guarded.

3. Whether the dangers at a peculiarly and unusually hazardous crossing are such that ordinary care requires it to be guarded in some such manner, is a question for the jury.

Charge to jury error.

4. The crossing in question was not unusually hazardous, and instructing the jury that they could find defendant negligent for failing to guard it by gates, or a flagman or some other warning device, was error.

Submitting issue to jury error.

5. The evidence will not sustain a finding that the usual warning signals for the crossing were not given, and submitting this issue to the jury was error.

Question of speed of train for the jury.

6. There is evidence tending to show that the train was run over this crossing at an unlawful and unusual rate of speed, and whether defendant was negligent in this respect was a question for the jury.

Contributory negligence.

7. The evidence does not show conclusively that the deceased was guilty of contributory negligence or engaged in a joint enterprise with the driver of the automobile, and these questions were for the jury.

Request to charge — train had right of way.

8. The train had the right of way, and the men operating it had the right to assume that the automobile would stop in time to avoid a collision, and the court should have given the charge to that effect requested by defendant.

Action in the district court for Wadena county to recover $7,500 for the death of plaintiff's intestate. The answer alleged contributory negligence on the part of plaintiff's intestate in failing to take proper care and precaution for her own safety before attempting to cross and in failing to use her senses of sight and hearing. The case was tried before Roeser, J., who at the close of the testimony denied defendants' motion for a directed verdict, and a jury which returned a verdict for $5,400. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Reversed.

M. L. Countryman and *A. L. Janes,* for appellants.

Byron R. Wilson and *M. J. Daly,* for respondent.

TAYLOR, C.

The public highway, known as the Jefferson Highway, crosses the Great Northern Railway track within the corporate limits of the village of Wadena, but south of the built-up portion of the village. Plaintiff with his family, consisting of his daughter Alice, 19 years of age, and three younger children, resided on a farm a few miles south of the village. A married daughter, Mrs. McCormick, with her babe, eight months of age, was also at the farm on a visit. On August 23, 1919, Mrs. McCormick and Alice, taking the babe with them, drove to the village in plaintiff's automobile, a Dodge touring car. Shortly after 4 o'clock in the afternoon they started to return along the Jefferson Highway, Alice in the rear seat holding the babe and Mrs. McCormick in the front seat driving. At the crossing they were struck by a passenger train coming from the south and Alice and the babe were killed. Alleging that the accident resulted from the negligence of defendant, plaintiff, as administrator of the estate of Alice, brought this action for damages and recovered a verdict. Defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial and appealed from an order denying it.

Plaintiff claimed that defendant had been negligent in three particulars: First, in running the train over the crossing at an unlawful and unreasonable rate of speed; second, in failing to give the usual warning of the approach of the train by blowing the whistle and ringing the bell; and third, in failing to maintain either gates, a flagman or a gong at this crossing. The court submitted these three claims to the jury and instructed them to the effect that plaintiff was entitled to recover if they found that defendant had been negligent in any one of the three particulars specified, and did not find that Alice had been guilty of contributory negligence. Submitting to the jury a ground for recovery which is not justified by the evidence is reversible error, for the jury may have based their verdict on that ground. Dunnell, Minn. Dig. and Supp. § 7174, and cases there cited.

In Lawler v. Minneapolis, St. P. & S. S. M. Ry. Co. 129 Minn. 506, 152 N. W. 882, it was held that the failure to provide gates, or a flagman or a signal bell at the crossing of the principal street of a village

of 700 people, was an element to be taken into consideration in determining whether it was negligence to run a train over that crossing at a speed of 50 miles an hour.

In Zenner v. Great Northern Ry. Co. 135 Minn. 37, 159 N. W. 1087, it was held that the jury might find that ordinary care required "either crossing gates, or a flagman, or automatic bells or some other warning device" at the busiest crossing in a city of 10,000 inhabitants, but it was expressly stated that the question whether such precautions were required at country road crossings was not before the court.

In Gowan v. McAdoo, 143 Minn. 227, 173 N. W. 440, the accident occurred at a crossing in the village of Barnum over which all travel to or from the territory west of the village passed. Defective planking rendered the crossing dangerous; the view of a driver approaching it was obstructed, and a finding that the train was running at a rate of 60 miles an hour would have been justified. This court sustained the action of the trial court in submitting to the jury the question whether ordinary care required the maintenance of gates, a flagman or a bell at this crossing, saying that whether the railway company "exercised the required degree of care in view of the location of the crossing, the conditions surrounding its maintenance and the rate of speed at which trains were run over it, was a question for the jury to pass upon."

The court recognized that the crossing in each of these cases was peculiarly and unusually hazardous, and on that ground held that whether ordinary care required the maintenance of gates, a flagman or some other warning device at the particular crossing, was a question for the jury. It was not held, nor intended to be held, that this rule applied to crossings not extra hazardous.

The authorities uniformly hold that, in the absence of a statutory requirement, the failure of a railway company to provide gates, a flagman or other warning device at ordinary crossings, is not negligence, and that the failure to provide such protection at a crossing can be held to be negligence only where the location and surrounding conditions and the manner in which trains are run over it are such as to render it unusually dangerous. Cowen v. Dietrick, 101 Md. 46, 60 Atl. 282, 4 Ann. Cas. 292, and numerous cases cited in note found in 4 Ann.

Cas. at page 294; Folkmire v. Michigan United Rys. Co. 157 Mich. 159, 121 N. W. 811, 17 Ann. Cas. 979, and cases cited in note in 17 Ann. Cas. at page 982.

While the crossing in question was on a much traveled highway and within the corporate limits of the village, there were no houses in its immediate vicinity, and the view of a traveler approaching it was not obstructed by buildings or other obstacles. The railway was a branch line, over which the only traffic was a passenger train, which passed each way daily, and a freight train, which passed in one direction one day and in the opposite direction the next. We are unable to see wherein this crossing differed in any substantial respect from the ordinary crossings on any much traveled highway, and are satisfied that the evidence does not disclose any of those peculiar or unusual hazards which would justify a finding of negligence in failing to maintain gates, a flagman or other warning device at this place.

Plaintiff asserted that the customary warning signals for the crossing were not given. The train always stopped at the station in the village. The engineer and fireman testified that the whistle was blown for the station and also for the crossing, and that the bell was rung. Several residents of the village testified that they heard both the station whistle and the crossing whistle, and one or two testified that they also heard the bell. Against this positive testimony we have the negative testimony of Mrs. McCormick that she heard no warning signals whatever. Her child was crying in the back seat and this may have distracted her attention. However this may be, she evidently gave no attention to the railroad, although perfectly familiar with the crossing, for the train was in plain sight at all times after she reached a point 300 feet from the track, and she remained wholly unaware of its approach until she heard the exhaust from the engine, when she was so near the track that she was unable to stop in time to avoid the collision, although she says she was going at a speed of only 10 miles an hour. The evidence is clearly insufficient to warrant a finding that the signals were not given. Cotton v. Willmar & S. F. Ry. Co. 99 Minn. 366, 109 N. W. 835, 8 L.R.A.(N.S.) 643, 116 Am. St. 422, 9 Ann. Cas. 935; Uggen v. Bazille & Partridge, 123 Minn. 97, 146 N. W. 112; Moore v.

Minneapolis & St. L. R. Co. 123 Minn. 191, 142 N. W. 152, 143 N. W. 326; Plachetko v. Chicago, B. & Q. R. Co. 139 Minn. 278, 166 N. W. 338.

It is conceded that an ordinance of the village prohibited running trains over this crossing at a greater rate of speed than 12 miles an hour and that defendant's train crews were instructed to comply with this requirement. The engineer testified that he had slowed down to 12 miles an hour at the crossing. The estimate of Mrs. McCormick as to the rate of speed is not of much probative value, for she had only a momentary view of the moving train and her estimate could be little better than a guess, but a passenger on the train estimated the speed at 20 or 25 miles an hour. This testimony, together with the fact that the train struck the automobile with sufficient momentum to throw it 25 or 30 feet and to throw parts of it some 200 feet, we deem sufficient to make the question whether the train was run over this crossing at an unusual and unlawful rate of speed a question for the jury.

It appears that Mrs. McCormick was the one whom their father, the owner of the car, told to drive it on this occasion. But from the facts that both Mrs. McCormick and Alice had frequently driven the car, that they went to the village to make social calls, and to arrange a boarding place for a younger sister who expected to attend school in the village, and that Alice drove while going to the village and Mrs. McCormick while returning, defendant contends that they were engaged in a joint enterprise and that the negligence of Mrs. McCormick is imputable to Alice for that reason. The fact that both were going to the village for the same purpose and that each drove the car at times, did not necessarily constitute driving the car a joint enterprise. The management of the car was entrusted to Mrs. McCormick by its owner, and Alice had no authority to control or direct the manner in which Mrs. McCormick operated it. Conceding that the evidence was sufficient to make a question for the jury, it was not sufficient to establish, as a matter of law, that they were engaged in a joint enterprise. Kokesh v. Price, 136 Minn. 304, 161 N. W. 715; 22 R. C. L. 1048.

Defendant contends that the evidence conclusively shows that Alice herself was guilty of contributory negligence in failing to observe the

train and warn her sister of its approach. If it had appeared that she saw the train, and knew, or from the circumstances ought to have known, that her sister was not aware of its approach, or was inattentive or a careless and reckless driver, there might, perhaps, be ground for charging her with contributory negligence as a matter of law, although the question whether one not the driver nor in control of the car is guilty of contributory negligence is almost always a question for the jury. But here the crying child required, and doubtless absorbed, her attention. She was the younger and would naturally place confidence in her older sister to whom her father had entrusted the car. In the absence of knowledge to the contrary, she had the right to assume that her sister would exercise ordinary care and take proper precautions to guard against obvious dangers. She was only required to exercise the degree of care for her own safety which persons similarly situated would ordinarily exercise under like circumstances. She is dead and the presumption is that she was not negligent. On the facts as disclosed by the record the question as to her contributory negligence was for the jury. Carnegie v. Great Northern Ry. Co. 128 Minn. 14, 150 N. W. 164; Kalland v. City of Brainerd, 141 Minn. 119, 169 N. W. 475; Praught v. Great Northern Ry. Co. 144 Minn. 309, 175 N. W. 998.

As there must be a new trial for the errors in submitting to the jury the issues as to negligence in failing to give the usual warning signals, and in failing to maintain gates, or a flagman or other warning device at the crossing, it is proper to add that the train had the right of way and that the court should have given the instruction requested by defendant, to the effect that the men operating the engine, who saw the automobile approaching the crossing, had the right to assume, until the contrary became apparent, that it would stop in time to avoid an accident, and were not required to slacken speed for the purpose of avoiding a collision, until they realized that a collision was imminent if they failed to do so.

For the errors mentioned a new trial must be and is granted.

LEONARD ERIKSSON v. IVER J. BOYUM.[1]

October 28, 1921.

No. 22,390.

Compensation of attorney.

1. Under G. S. 1913, § 7973, a client has the unrestricted right to agree with his attorney as to the compensation to be paid him.

Attorney and client — modification of agreement to reasonable value.

2. A contract between attorney and client, entered into during the existence of the relation, changing a prior agreement as to the attorney's compensation from a stipulated amount to the reasonable value of the service rendered, is not void, but, in the absence of fraud, is valid and binding.

Corporation — action for restoration of profits wrongfully appropriated.

3. An action against trustees of a corporation to compel a restoration of profits claimed to have been wrongfully appropriated to their use, brought by a volunteer stockholder after refusal of the corporation to bring it, is in legal effect a suit by the corporation, though under the control of the volunteer plaintiff.

Volunteer stockholder cannot bind corporation for cost of suit.

4. The plaintiff in such a suit is without authority to bind the corporation for the cost and expense thereof in the event it fails of its purpose.

Construction of contract with attorney.

5. The contract between the attorney and client in this case, under which a suit of the kind was commenced, construed to obligate plaintiff in the action in the event of failure of the action to compensate the attorney for his services.

Submission to court of value of attorney's services.

6. A stipulation in the contract to submit the question of the value of the attorney's services to the court at the conclusion of the action, *held* valid and binding on the parties and to confer upon the court by a

[1]Reported in 184 N. W. 961.

supplemental proceeding in the action jurisdiction to hear and determine the matter.

Award of court reduced.

7. The award of compensation made by the court held excessive and a reduction thereof is ordered.

New trial.

8. The record presents no error requiring a new trial, and the evidence supports the findings of the trial court.

Action in the district court for Otter Tail county to recover $5,000 for legal services and to have the amount declared a lien upon certain shares of capital stock. The case was tried before Roeser, J., who made findings and ordered judgment in favor of plaintiff for $2,340. Defendant's motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Charles L. Alexander and *N. F. Field,* for appellant.

J. W. Mason and *Leonard Ericksson,* for respondent.

BROWN, C. J.

Defendant in this action owned a majority of the common stock in the Fergus Falls Woolen Mills Company, a corporation, and 77 shares of its preferred stock. He had been general manager of the affairs of the company for some time, of and concerning which other stockholders had expressed considerable dissatisfaction. The corporation under his management had apparently become insolvent and unable to pay its bills and was compelled, at least it was deemed advisable, to transfer its property and effects to certain trustees for the benefit of creditors. The assignment was accordingly made, bearing date December 23, 1913, and the trustees assumed charge of the company affairs. Fergus Falls W. M. Co. v. Boyum, 136 Minn. 411, 162 N. W. 516, L.R.A. 1918A, 919. They continued the business and succeeded in restoring prosperity for the company, and during their stewardship there was a reorganization and a new set of officers placed in charge; the trustees completed their work in June, 1914. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

Defendant had pledged his stock to a local bank as security. The bank converted some of it and threatened to sell and dispose of the balance, and suit was brought by defendant to enjoin the same. Pending the litigation the parties effected a settlement of the matter, and to that end entered into a "stock voting agreement," by which certain of the stockholders were authorized to vote defendant's stock in all corporation affairs. The settlement included a stipulation that defendant should have employment with the company in some capacity and be made one of the directors. Defendant thus parted with control of his stock and of the company, and it was thereafter managed by others chosen by the new directors.

Some time in 1918 defendant discovered what he believed to be misconduct on the part of the trustees, who had charge of the business pending the temporary insolvency of the company, by which they had realized large profits to themselves in dealing with the assets and effects committed to them. He demanded that the new officers of the company bring suit against them to recover for their alleged misconduct and the officers refused, having first made inquiry into the matter and finding the trustees free from the charge made against them. At about the same time defendant became dissatisfied with the stock voting agreement, and was anxious to have it set aside and the full control of his stock restored to him. This necessitated a lawsuit, for the other parties to the agreement would not consent to its cancelation.

With these two prospective lawsuits in mind defendant sought out plaintiff in this action, Leonard Eriksson, an attorney in good standing at Fergus Falls, the place of residence of all the parties, and counseled with him in reference thereto. The subject was thoroughly gone over, and defendant was advised that he could maintain an action against the trustees, in behalf of the corporation, to recover the profits alleged to have been realized by them in the conduct and management of the corporate affairs in the creditor proceedings, and that he could also maintain an action for the dissolution of stock voting agreement. Negotiations finally resulted in the employment of Eriksson to take charge of the contemplated litigation. The agreement was put in writing, and by the terms thereof Eriksson agreed to commence and con-

duct to a conclusion the action to set aside and dissolve the stock voting agreement, and his compensation was fixed at the sum of $160, and to conduct the action against the trustees, for which his compensation was fixed at the reasonable value of his services, the same to be ascertained and determined by the court in the action at the end of the litigation. The actions were both subsequently commenced by Eriksson, and they were thereafter tried and determined by the court. Defendant prevailed in the stock voting suit and the stock held up by that agreement was returned to him. He lost the action against the trustees, the court having fully exonerated the trustees from the charge of wrongdoing made against them therein. Boyum v. Jordan, 146 Minn. 66, 178 N. W. 158.

Thereafter Eriksson applied to the court in the action against the trustees, as provided by the agreement, for an order fixing his compensation for services rendered in that litigation. In response to an order to show cause in the matter, defendant appeared generally and by counsel interposed a somewhat lengthy answer, containing much irrelevant and immaterial matter, but construed as a whole fairly putting in issue the merits of Eriksson's claim to compensation. No objection was therein made to the jurisdiction of the court to hear and determine the issues in that manner.

Eriksson filed a lien against the stock involved in the other action, claiming compensation for his services in excess of that stipulated in the contract of employment, and subsequently brought this action to have the value of those services determined, and the amount thereof declared a lien against the stock. The basis of the action is that the original agreement fixing his fees at $160 was subsequently modified by mutual agreement to the reasonable value of the services rendered in that suit. Defendant put in issue this claim of modification and pleaded payment of the agreed amount of $160.

Upon issues thus formed, both proceedings came before the court for trial at the same time. They were tried separately and submitted to the court upon the record made in each. The court made findings of fact in each, determining the issues in favor of Eriksson and fixing his compensation in the action against the trustees at the sum of $3,250, and

the value of his services in the stock voting suit at the sum of $2,500, less $160 conceded to have been paid. A motion for a new trial was made in each case and denied, and, from separate judgments for Eriksson in harmony with the findings, defendant appealed. The appeals were argued together in this court.

It is contended in this action, being the one to recover compensation for services rendered in the stock voting suit: (1) That the alleged modification of the contract fixing the compensation of the attorney at $160, if entered into at all, was void and unenforceable because made pending the relation of attorney and client, after the action had been commenced and before the trial thereof and required defendant to pay a larger compensation than stipulated by the original agreement; (2) that the evidence does not sustain the findings of the trial court to the effect that the contract was modified as claimed by plaintiff; and (3) that the amount awarded plaintiff is excessive and unreasonable in amount.

1. It is well-settled law that contracts between attorney and client entered into during the existence of the relation are not void. When fairly entered into and free from fraud, whether in reference to the compensation of the attorney, or as to dealings in the subject matter involved in the relationship, they are as valid and binding as contracts between strangers, where no fiduciary relations are involved. In some jurisdictions an agreement entered into during the existence of the relation by which the attorney secures an increase in the compensation originally agreed to is held invalid. That, however, is not the prevailing rule in this country. The subject is usually covered by statute. 2 R. C. L. 1037; Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. 150, note on page 159. It is provided by statute in this state, G. S. 1913, § 7973, that a party shall have the unrestricted right to agree with his counsel as to compensation, and the measure and mode thereof. This necessarily includes the right to modify an existing contract on the subject, and, if the modification be free from fraud or unfairness, the courts are bound to respect it. It is not void. There is here no claim of fraud, and the change from a fixed fee to the reasonable value of the service to be rendered, is neither unreasonable nor unfair, and is

based upon a sufficient consideration. The attorney is thereby placed in position to claim more than the amount agreed upon originally, and the client occupies equally as advantageous a situation, for he may be heard to insist that the stipulated amount was excessive and unreasonable, and that a lesser amount would be reasonable compensation, thus leaving the amount to be paid, from the standpoint of both parties, open to inquiry and judicial determination.

2. The evidence made the question whether the modified agreement was in fact entered into one for the trial court to determine. We find from the record no sufficient basis for disapproving its conclusion therein. In fact the finding that the contract was so modified seems amply supported by the evidence.

3. Although the amount of compensation awarded by the trial court seems large, we are satisfied, in view of the substantial benefits accruing to defendant as the result of that litigation, that the amount awarded is not out of proportion to the importance of the case to defendant and the services rendered, and we approve of the allowance made.

4. The provisions of the contract in reference to the attorney's fees are as follows:

"In consideration of the services to be performed by my said attorney, I promise and agree to pay to him $160 for the first suit, on or before Nov. 1, 1918, * * * and for compensation for services to be rendered in the second suit my said attorney shall have such a fee as the court may, in said action, determine to be a reasonable fee for the services rendered, to be paid by the Fergus Falls Woolen Mills Co."

The second suit referred to in the contract, was to subject the trustees to liability for their alleged misconduct in the management of the trust estate. The corporation, through its officers, had refused to bring the action, and it was brought by defendant as he had the right to do under the law. Bailey v. Strachan, 77 Minn. 526, 80 N. W. 694; 3 Pomeroy, Eq. Jur. § 1095. It was, however, in legal effect a suit by the corporation, conducted by defendant as its voluntary representative. But, though in charge of the litigation, he was without authority to bind the corporation to the payment of either costs or attorney's fees in the event the suit was unsuccessful. If in such cases failure attends the

result, he who volunteers his service and brings the action is alone responsible for the cost and expense incurred. When successful the court may make the expense, including attorney's fees, a charge against the corporation. Graham v. Dubuque, etc., Machine Works, 138 Iowa, 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729. The provision of the contract in this case, by which attempt was made to charge the attorney's fees to the corporation, can therefore have no binding force or effect. Nor can the contract as a whole be construed as a matter of law an undertaking on the part of the attorney to conduct the suit without compensation if unsuccessful. The most that can be said for the contract in this respect is that it is perhaps sufficiently ambiguous on the point to justify explanation by parol evidence. But no such evidence was tendered on the trial. And, having instigated the litigation and employed counsel to conduct it, defendant necessarily must be deemed, in the absence of some showing to the contrary, to have intended to pay counsel for his work if there was a failure in results. The contract must be so construed.

5. The contentions: (1) That the agreement for submission of the question of the attorney's fees to the court is invalid, conferring no jurisdiction on the court to hear or determine the matter; and (2) that the contract is void as against public policy, are not sustained. It is immaterial whether the contract be considered as one of arbitration, or as a plain submission of the question to the court for determination as an incident following the failure of the suit. We discover no reason for holding it invalid as against public policy or otherwise. Clearly under our statute the client may enter into such an agreement. The record presents no suggestion of unfairness, and the special contention that the client is thus wrongfully deprived of a jury trial is without substantial merit. Similar proceedings, had in the main action, to determine the attorney's compensation for services rendered therein, have often been entertained by the court on the petition of the attorney, in the absence of contract stipulation. Forbush v. Leonard, 8 Minn. 267 (303); Crowley v. LeDuc, 21 Minn. 412; Weicher v. Cargill, 86 Minn. 271, 90 N. W. 402; Farmer v. Stillwater Water Co. 108 Minn. 41, 121 N. W. 418. If the attorney may maintain such a proceeding

in the main action, in the absence of a contract consent of the client, no reason occurs to us why the parties may not voluntarily stipulate such a submission. It is not a differentiating fact that in the cases cited the asserted lien of the attorney was involved. The authority and jurisdiction of the court to entertain the proceeding and determine the attorney's compensation is the same in either case. Nor is the client by the agreement deprived of a jury trial. The court has the right to grant a jury in such cases when application therefor is seasonably made. G. S. 1913, § 4956. A jury trial was had in the Farmer case just cited. Defendant in this case made no demand for a jury. The objections to the validity of the agreement were therefore properly overruled by the trial court.

6. Defendant also contends that the amount awarded, $3,250 is excessive and beyond what the facts of the case really justify. In this we concur. The litigation to an extent, as between defendant and the attorney, was speculative. Both expected and hoped to win and to recover a judgment against the trustees in a substantial amount. Their hopes and expectations were not realized. The suit was a total failure, leaving in its wake nothing but disappointment, grief and expense. In fixing the attorney's compensation the facts stated should be considered; the result of the litigation—the disaster to the client—as well as the quantum of legal work performed by the attorney. And from that viewpoint we conclude that $1,500 will be fair compensation for the services rendered in that litigation.

7. There was no error in the denial of the motion for a new trial on the ground of newly discovered evidence. The findings of the court in each action and proceeding are sustained by the evidence, and the record presents no error requiring a new trial.

The judgment in the first action, number 22,390 in this court, is in all things affirmed. The judgment in the second action, number 22,389 in this court (Boyum v. Jordan, infra, page 200), will be reversed and a new trial granted upon all issues presented therein, unless within 10 days from the going down of the cause to the lower court plaintiff shall file a written consent to the reduction of the judgment to the sum of $1,500. If the consent be so filed, the judgment will be and it is in all things affirmed.

IVER J. BOYUM v. J. F. JORDAN AND ANOTHER.[1]

October 28, 1921.

No. 22,389.

Leonard Eriksson obtained from the district court for Waseca, Otter Tail county, an order directed to Iver J. Boyum and the Fergus Falls Woolen Mills Company to show cause why attorney's fees amounting to $2,000 less $160 should not be paid to him by plaintiff. The matter was heard by Roeser, J., who made findings and ordered judgment for $3,250. Defendant's motion to dismiss or to grant a new trial was denied. From the judgment entered pursuant to the order for judgment, insofar as it was against him personally, Iver J. Boyum appealed. Reversed unless plaintiff consented within 10 days after remand to a reduction of the judgment to $1,500.

Charles L. Alexander and *N. F. Field,* for appellant.

J. W. Mason and *Leonard Eriksson,* for respondent.

PER CURIAM.

For reasons stated in the foregoing opinion the judgment appealed from in this cause is reversed and a new trial granted as to all issues in the case, unless plaintiff, within 10 days after the cause is remanded to the court below, shall file a written consent to a reduction of the amount of the judgment to the sum of $1,500. If such consent be filed the judgment will be and is hereby in all things affirmed.

MARGARET BONDERSON v. NELS BONDERSON.[2]

October 28, 1921.

No. 22,402.

Assault and battery — verdict excessive.

1. A verdict of $4,000 for assault and battery *held* so excessive, in view

[1]Reported in 184 N. W. 964.

[2]Reported in 184 N. W. 836.

of the evidence, as to demonstrate that the jury gave it under the influence of passion and prejudice.

New trial preferable to reduction of verdict.

2. In such a case, and where the record indicates the existence of available testimony to furnish a proper basis for the assessment of damages, a new trial should be ordered rather than a reduction of the verdict.

Action in the district court for Chisago county to recover $11,000 for assault and battery. The case was tried before Searles, J., and a jury which returned a verdict for $4,000. From an order denying his motion for a new trial, defendant appealed. Reversed.

Barrows & Metcalf, for appellant.

H. D. Blanding, W. T. Kennedy and *W. S. Irving,* for respondent.

HOLT, J.

Plaintiff recovered a verdict against defendant, her brother-in-law, of $3,500 compensatory and $500 punitive damages for assault and battery. Defendant moved for a new trial on the ground of excessive damages given under the influence of passion and prejudice, and for errors in the admission of evidence and also in the charge.

The defendant lived with his father and mother upon a farm leased by him to his brother, plaintiff's husband. They all lived in the same house, but certain rooms were set apart for plaintiff and her family. Defendant worked for plaintiff's husband on the farm. On March 6, 1920, near 6 o'clock in the evening, plaintiff and her husband were in the barn milking, and defendant came in to care for the stock, as the former were having some dispute. Plaintiff claims that defendant mixed in, accused her of wrongs, and finally dragged her out of the barn, threw her down against some stones and beat her. The version of defendant is radically different, claiming that plaintiff commenced the verbal assault and when that grew so vicious as to accuse his aged mother of crime, he took hold of plaintiff and merely led her out of the barn. Were his account true, the damages should have been nominal only.

On this appeal we must accept plaintiff's version of the affray, and

also, as far as possible, of the effect upon her. But an examination of the record with this rule in mind compels the conviction that the verdict is so excessive that the jury must have given it under the influence of passion and prejudice.

We shall only touch on one or two matters which might have affected the jury and incited passion and prejudice: The failure of plaintiff's husband, her natural protector, to interfere in her behalf, and the fact that the jury were permitted to find an operation attributable to the assault. For an injury which requires a serious or major operation, very substantial damages may undoubtedly be awarded. But upon this record there is no evidence that defendant's conduct produced the condition that required the operation, except plaintiff's bare uncorroborated statement that, within a day or two after the fracas, she felt a sore spot and a lump in her side and that this continued to pain her until the operation, some time in June following. The surgeon who operated was not called. The jury had no means of knowing what was removed, if anything, or whether the ailment which required the operation could be at all ascribed to an injury received in the altercation. Nothing as to an operation was intimated in the complaint, and, although we are of opinion that its allegations of injuries are broad enough to permit proof of one that had to be operated, still it is readily seen how defendant's attorneys may not have known of the operation or have surmised that it would ever be claimed that it resulted from the assault, and were therefore not prepared with testimony to combat such claim first made at the trial.

Plaintiff went direct from the altercation to a neighbor to telephone for the sheriff, and the second day she walked 6 miles to lodge a criminal complaint against defendant. No person who saw plaintiff immediately after the occurrence was called to testify to any bruises or evidence upon her of rough handling or beating. Defendant is a large, strong man, and, if he had so viciously struck as plaintiff claims, there surely would have been marks which others noticed. However, the only testimony came from her children, one 9 and the other 11 years old, that they saw two small black spots on her back just below the shoulder the day after the assault. She testifies to backache, and a different sort

of headache since the fracas and inability to labor. All are subjective indications and so invariably appear in exaggerated form in the testimony of all plaintiffs in personal injury cases, that large awards should not be predicated thereon, unless there be some corroboration or corroborative circumstances. Especially ought that to be so where, as in this case, the record indicates that plaintiff has within reach other evidence than that produced at this trial bearing upon her condition after the trouble and the cause of the operation. Again there is no proof whatever of permanent injuries.

There are many cases where, without the aid of medical experts, the jury may draw the inference that a blow or a fall produced a condition that appears at some subsequent time. Such was the case of Plonty v. Murphy, 82 Minn. 268, 84 N. W. 1005, where a miscarriage was claimed to have been caused by fright, and where the damages awarded were $300. In the case of Elvidge v. Stronge & Warner Co. 148 Minn. 185, 181 N. W. 346, there was medical expert testimony on both sides of the proposition.

We refrain from a further discussion of the evidence, for we think there ought to be a new trial, rather than an attempt by this court to reduce the verdict, for we are persuaded that testimony exists bearing upon the extent of the injuries, if any, which when properly presented, may enable a jury to find a tangible basis for a verdict and so as not to disclose the influence of passion and prejudice by its excessiveness.

The order is reversed and a new trial awarded.

STATE EX REL. CLIFFORD L. HILTON, ATTORNEY GENERAL v. VILLAGE OF BUHL AND OTHERS.[1]

October 28, 1921.

No. 22,236.

Village — what territory may be annexed.

1. In a proceeding under G. S. 1913, § 1800, et seq., to annex terri-

[1]Reported in 184 N. W. 850.

tory to a village, the property annexed must be so conditioned as properly to be subjected to village government.

Same — courts will not sustain arbitrary action by voters.

2. Whether it is so conditioned is primarily for the voters, but if their action is clearly arbitrary, for the purpose of increasing sources of revenue rather than of subjecting to the local village government property having a natural connection with it and people residing thereon having a community of interest, the courts will not sustain it.

Annexation invalid.

3. The territory annexed to the village of Buhl was not so conditioned as properly to be subjected to the village government, within the meaning of the legislature, and the annexation was arbitrary and invalid.

Upon the relation of Clifford L. Hilton, Attorney General, the supreme court granted its writ of quo warranto directed to the village of Buhl and its officers to determine the legality of the annexation of certain territory to that village. Writ of ouster ordered.

Clifford L. Hilton, Attorney General, and *Washburn, Bailey & Mitchell,* for relator.

Warner E. Whipple and *A. R. Folsom,* for respondents.

DIBELL, J.

Quo warranto on the relation of the attorney general to determine the validity of the annexation of territory to the village of Buhl in St. Louis county.

1. The proceeding for annexation was under G. S. 1913, § 1800, et seq. It was regular. The respondents contend that since the statutory proceeding was regular there is nothing for review by the courts. We have held that section 1800 must be construed in connection with section 1204 et seq., and that the requirement of section 1204, not contained in section 1800, that the property annexed must be "so conditioned as properly to be subjected to village government," attaches to the proceeding under section 1800. State v. Village of Gilbert, 127 Minn. 452, 149 N. W. 951; State v. Village of Kinney, 146 Minn. 311, 178 N. W. 815. The holding was made after argument, it was correctly made, and it is to be taken as settled law.

2. The question whether territory proposed to be annexed is so conditioned as properly to be subject to village government, is primarily and in the first instance one of fact for the voters, and their decision will not be disregarded, unless it clearly appears that it was arbitrary. That was distinctly held in State v. Village of Dover, 113 Minn. 452, 130 N. W. 74, 539.

In referring to the meaning of the requirement that the lands annexed be so conditioned as to be properly subject to village government, the court in that case said [p. 456]:

"It does not mean that there must be a present necessity for such lands for building or other village purposes. It is not necessary that all such lands shall be platted, graded, or used for village purposes at any particular time in the future. Adjoining lands may be brought within the limits of the corporation and be subjected to village government, if it may fairly be said that there exists, or may exist within a reasonable time in the future, a unity of interest in the enforcement of law, such as police patrol and the public health."

In State v. Village of Alice, 112 Minn. 330, 127 N. W. 1118, the court, referring to the same matter, said [p. 332]:

"Whether the adjacent territory may be properly subjected to village government is not to be determined by the pecuniary interests of the owners thereof; but their land cannot arbitrarily be brought into the village simply for the purpose of increasing its revenues by taxing it. The adjacent lands must be so near to the center of the platted lands as to be somewhat suburban in their character. The final test is whether the platted territory and the adjacent territory are so limited in area and have such a natural connection, and the people residing thereon have such a community of interest, that the whole may be properly subjected to village government."

The general principles announced in these cases were followed in the Gilbert case and in the Kinney case just cited, and the court appreciated the nature of the range mining country, the character of the villages scattered along it, the presence of mining locations and clusters of people without village government but tributary to organized villages, with intervening unsettled areas, and the desirability or neces-

sity of policing and providing sanitation and other comforts and conveniences.

2. Prior to the annexation under review Buhl contained substantially 41 forties or 1,640 acres. The platted portion was on 3 forties. The territory annexed contains slightly less than 2,800 acres. West of a line projected along the westerly border of the village there are substantially 1,400 acres. There are 3 residents. They live on a forty more than a mile west of the westerly line of the village and about 2 miles from the platted portion. Directly north of the village 8 forties, 3 of them state land, are annexed. There are no residents. South and southeast there are annexed 27 forties. On 9 of these there are residents. On the others there are none. Six or seven are state land.

Buhl had a population of 2,008 by the 1920 census. By the annexation its population was increased by 104, of whom 19 were voters. It had an assessed valuation of 9½ millions. By the annexation it got 4½ millions more.

The lands around the village are of the usual character of cut-over lands with brush growing and stumps standing. The territory to the west is crossed by a steam railroad and by the range electric line, and there are public highways. At the south and east, where all of the 104 except 3 live, there are a few who do farming. It amounts to little. They gain their livelihood by working in the mines or in the village or otherwise. The evidence does not show that mining development affecting the village is to be expected in the near future. The inference from the evidence is to the contrary. One forty at the extreme west of the added territory is now being stripped. It will be mined as an open pit mine in connection with 3 forties running east and west immediately west of it. The entrance is from the west. It will add no population to the annexed territory. The mining locations for this development are to the west in the village of Chisholm. The village, like other villages, is occasionally in danger from brush fires within its limits or outside of them. There is nothing exceptional in the situation of Buhl. Perhaps some of the territory to the south and to the east, where the 101 people live, is properly conditioned for village government. That is not a matter for present consideration.

There were 19 voters in the added territory. They voted unanimously for annexation. By their vote they added a population of 104 to the village's population of 2,008, 2,800 acres to the village's 1,640 acres, and an assessed valuation of 4½ millions to the village's 9½ millions. Nearly all of the added valuation of 4½ millions comes from the area of 1,400 acres containing a population of 3. The territory to the south and east, with a population of 101, adds less than $10,000 to the valuation.

The levy of taxes for village purposes in 1920 was $350,000; in 1919, $268,000; in 1918, $273,000 and in 1917, $179,000. The village has an indebtedness in excess of $600,000. These taxes do not include taxes for the support of schools and the indebtedness does not include the indebtedness of the school district. An increase of taxes in the annexed territory because of annexation is an expected result. It does not prevent annexation. But, as said in State v. Village of Alice, supra, land cannot be brought into a village arbitrarily just to increase its revenues or to add taxable property. The annexed territory ought of right to have some advantages for the increased taxes it pays.

We defer, as we ought, to the views of the 19 voters. We would blind ourselves to the facts, if we declined to see that the purpose of the annexation of all this territory is to annex sources of revenue rather than territory properly subject to village government. We do not hesitate to hold that the annexed territory is not so conditioned, within the meaning of the legislature, as to be subjected to the village government of Buhl and that the annexation is arbitrary and invalid.

Let a writ of ouster issue.

STATE v. MINNEAPOLIS COLD STORAGE COMPANY.[1]

October 28, 1921.

No. 22,420.

Taxation — when books and papers of taxpayer need not be produced.

1. It is within the power of a court to require a party to a tax enforcement case to produce his books and papers, if they contain evidence material to the issues to be tried, but not to enable the opposite party to examine them and use information gained from them as a basis for taxing the property of third persons.

Production of books properly denied by trial court.

2. The trial court was justified in its conclusion that the production of defendant's books was demanded in order to enable the representatives of the state to fish for evidence, and in declining for that reason to require their production.

Appeal and error — reversal — limit to cross-examination discretionary.

3. The latitude to be allowed in cross-examination is largely within the discretion of the trial court, and its action will not be reversed on appeal, except for a clear abuse of such discretion. There was no such abuse in the rulings complained of.

Assessment of personal property — evidence supports finding.

4. The evidence is sufficient to support the findings as to the value of defendant's personal property when it was assessed for taxation.

Citation in the district court for Hennepin county to recover $7,150.73 as personal property taxes for the year 1919. The answer alleged that defendant's property was of the value of $1,425 and no more. The matter was heard by Bardwell, J., who made findings and ordered judgment for $30.73 against defendant. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

Floyd B. Olson, County Attorney, and *Frank J. Williams*, Assistant County Attorney, for appellant.

Edwin S. Slater, for respondent.

[1]Reported in 184 N. W. 854.

LEES, C.

This is a proceeding to enforce the payment of delinquent taxes assessed against defendant's personal property. Defendant had returned a list to the assessor showing that on May 1, 1919, its taxable property was of the value of $1,425. The assessor raised the amount to $100,475. The board of equalization denied its application for a reduction. Defendant declined to pay the tax and resisted its collection on the ground that there had been a gross overvaluation of its property. The court found in its favor and the state has appealed from an order denying its motion for a new trial.

Defendant is a public warehouse company engaged in the cold storage business in the city of Minneapolis. On May 1, 1919, it had in its possession, stored in its warehouse, merchandise of a value greatly in excess of the amount of the assessment. Its vice president and general manager testified that it did not own any of the goods stored with it, and that all such goods were owned by other corporations or firms. Three of the employes testified that its books and records contained no entries showing that it had stored any goods in its warehouse, and that if it had done so there would have been such entries. The county attorney requested the court to direct the defendant to produce its books and records for inspection and to enable him to cross-examine the witnesses who had testified to the absence of such entries. Defendant's vice president testified that he knew the names of some of the concerns that had stored goods in its warehouse, and on cross-examination was asked to give the names. The court refused to order defendant to produce its books, and sustained objections to cross-examination of the vice president to ascertain the names of those who had stored goods with defendant. These rulings are complained of and furnish the principal grounds upon which a reversal is sought. Defendant justifies the court's refusal to compel the production of its books on four grounds: Because no effort was made to secure an inspection before the trial, under section 8447, G. S. 1913; because no subpoena duces tecum was issued; because there was no specific description of the books required or specification of the period of time to be covered by entries which might appear in them, and finally because the demand for their production was

made solely to enable the representatives of the state to embark on a fishing expedition to ascertain who were the owners of the goods with a view to taxing them.

It is within the power of a trial court to require the production of the books and papers of a party to an action which contain evidence material to the issues to be tried, Carson v. Hawley, 82 Minn. 204, 84 N. W. 746; McGuire v. Village of Caledonia, 140 Minn. 151, 167 N. W. 425, L.R.A. 1918D, 943, and we do not attach much weight to the first three reasons advanced in support of the court's ruling. But we think it may be sustained on the ground which defendant suggests last.

When the demand was made, the court, after inquiry respecting the use proposed to be made of the books, informed the county attorney that he was not prepared to rule that they should come in for the purposes of a fishing expedition. Defendant's counsel inquired whether the county attorney was willing to have the books examined without making a record of the names of the owners of the goods, unless the books showed that defendant was an owner. He replied that, if the books disclosed that other persons owned the goods and that they had not been taxed, he would not stipulate that he would not disclose the facts or do his duty in collecting the taxes. Thereupon the court ruled that defendant should not be compelled to produce the books. Later on the same question came up again, when defendant's counsel offered to permit an examination of its record cards, on condition that the names of the owners of the goods entered thereon should not be used by the state. The county attorney declined the offer, on the ground that it was incompatible with the discharge of his official duties to make such an agreement. The court adhered to its previous ruling, giving as the reason that on the statement of the county attorney, if he felt it incumbent to use any knowledge he might acquire from an inspection of the books and records in enforcing the payment of taxes by persons other than the defendant, it need not produce them. Finally, when another request for their production was made, the court suggested the appointment of an accountant to make a thorough examination to ascertain whether the books showed anything not in accordance with the testimony of defendant's witnesses, but not for the purpose of disclosing

the names of defendant's patrons. The county attorney declined to accede to the suggestion, saying: "No, I don't want to enter into any agreement wherein if a leak of any kind occurs I will be criticised, and I don't want to acquire any information that I can't use freely." The court then refused to modify its prior rulings, saying they had been made for the reason that the county attorney intimated that he felt obliged to use any information he might gain from the books in proceeding against the owners of goods whose names were thus ascertained.

We think it sufficiently appears that the real purpose of the demand for the production of the books was to gather information from them to be used as a basis of tax proceedings against third persons rather than an expectation that the entries would contradict the testimony of defendant's witnesses. Such an inquisition was not relevant to the issues on trial.

With respect to the rulings when defendant's vice president was cross-examined, the same situation was presented in a somewhat different form. He testified that defendant did not own any of the goods in its warehouse on May 1, 1919, and had no interest in them. When asked who owned them, defendant objected, and the objection was sustained. He was asked whether the Kildal Fish Company or Armour & Company owned any of them, and this was objected to and the objection sustained. Undoubtedly a witness who has testified that the party calling him had property in its possession, but did not own it, may be asked who the owner was, in order to test his credibility and lay a foundation for possible impeachment. If such was the purpose of the cross-examination, the court should not have sustained the objections.

But it is quite evident that the questions were put to elicit information to serve the same purpose as the repeated demands for the production of the books. The relation of a public warehouseman to his patrons is such that he is not bound to become an informer when called upon to disclose their names in order that they may be taxed. At least such was the case until the legislature made it the duty of warehousemen to furnish such information. This has been done by the enactment of chapter 527, p. 998, Laws of 1921. The fact that such legislation was deemed necessary, indicates that prior to its enactment no

such duty existed. In its absence public officials ought not to be permitted to accomplish by indirection that which could not be done directly. The latitude to be allowed in cross-examination is largely within the discretion of the trial court, and its action will not be reversed on appeal except for a clear abuse of such discretion. Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265; State v. Seeling, 126 Minn. 386, 148 N. W. 458. There was no abuse of discretion in the rulings complained of.

It is urged that, since the assessment was presumptively correct and the burden of proving the contrary rested upon the defendant, the evidence it produced was not sufficient to sustain the finding that the full and true value of its personal property was $1,425 and no more. We cannot so hold. True the testimony of defendant's bookkeeper and clerks was merely negative, for they had no knowledge of the amount or value of their employer's property. But the testimony of the vice president was direct and positive and if true was sufficient to sustain the finding in question. The other assignments of error are unimportant and need not be discussed. The order denying a new trial is affirmed.

ISADORE BUTKEVIZ v. CROWN IRON WORKS COMPANY AND ANOTHER.

FRANK ZEMBOL v. CROWN IRON WORKS COMPANY ET AL.[1]

October 28, 1921.

No. 22,456.

Negligence of truck driver — evidence — damages.

The evidence is sufficient to sustain the jury's finding that a collision which caused injury to plaintiff was caused by the negligence of the defendants. The damages are not excessive.

Two actions in the district court for Hennepin county, one to recover $1,200 for injuries received and expenses incurred because of a

[1]Reported in 184 N. W. 832.

collision between plaintiff's car and defendant's automobile truck, and the other to recover $25,000 for injuries to plaintiff's infant daughter. The cases were tried together before Jelley, J., who at the close of the testimony denied defendants' motions for directed verdicts, and a jury which returned a verdict for $300 in the first case and one for $4,000 in the second case. From an order denying their motion in each case for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

A. B. Darelius, for appellants.

A. A. Tenner, for respondents.

HALLAM, J.

Helen Zembol, whom we will designate as plaintiff, was injured January 14, 1920, by collision of an automobile, in which she was riding, with a truck belonging to the defendant Crown Iron Works Company and driven by defendant Nyman. This case is brought by Frank Zembol as father of Helen, and in her behalf, to recover damages. The jury found a verdict in favor of plaintiff for $4,000. The contention made on this appeal is that the verdict is not justified by the evidence.

The action is predicated on the negligence of the driver of the truck, The testimony in behalf of plaintiff is that she was riding in a car driven by Isadore Butkeviz, and going south on Central avenue in Minneapolis. When they arrived at the intersection of Tenth street N. E. and Central avenue, Butkeviz found the road very bad on account of accumulations of snow and ice and conceived the idea of turning around and going back. At this time the defendant's truck was approaching from the south and was on the right side of the street. As to just what happened then, the testimony is in conflict. Defendant's witnesses testified that the car "all of a sudden * * * jumped out of the road * * * run into the front wheel of the truck." The testimony on behalf of plaintiff, however, is that Butkeviz started to turn around and that in doing so his car became stalled; that at this point of time the defendant's truck was about 150 feet away, but that the truck continued on and struck the Butkeviz car while it was standing still. If this testimony on behalf of plaintiff is true, the jury might find negligence

on the part of the driver of the truck. We think the testimony presented an issue of fact for the jury.

Defendant's counsel strenuously contend, as we understand it, that the physical facts make it appear that the accident could not have happened as plaintiff claims. The evidence is that plaintiff was thrown forward through the wind-shield, and it is contended that this would be impossible if plaintiff's testimony as to the position of the Butkeviz car is true. We are at a disadvantage in understanding some of the testimony as to the accident by reason of the fact that a plat, not returned to this court, was used on the trial, and a good deal of the testimony was given by way of indications referring to the plat or marks upon the plat. The testimony is also confusing by reason of inaccurate references of the witnesses to names of streets and also to directions. But the testimony on behalf of plaintiff is quite clear that, at the time the Butkeviz car was standing still, it was facing toward a building described as the "Franklin Company building." From what we can gather from the testimony as to the location of the car, it seems not impossible that the collision might occur as plaintiff has described it, and in such manner as to throw plaintiff through the wind-shield of the car in which she was riding.

Defendant contends that the direct cause of the accident was the inexperience of the driver of the automobile and the absence of chains on the wheels and the negligence of the driver in attempting to turn in front of a heavy truck. The negligence of the driver, if merely contributory, would not be a defense, and we think the question as to whether his negligence or his conduct was the sole cause of the collision was a question for the jury.

Defendant contends that the damages are excessive. The testimony is that the injuries were severe and clearly they are sufficient to warrant a verdict in the amount found.

Order affirmed.

A. E. BATCHELDER v. JOHN W. STEPHENSON AND ANOTHER.[1]

October 28, 1921.

No. 22,532.

Fraud — complaint good against demurrer.

False representations deceitfully made by a third person to a prospective purchaser of land relative to its value, and the price for which it was offered and held, may constitute actionable fraud, and the facts alleged in the complaint, showing such representations made by third parties to a prospective purchaser, who reposed confidence in them, stated a cause of action.

Action in the district court for Hennepin county to recover $3,650 for fraudulent representations in the sale of land. Defendants' demurrer to the amended complaint was sustained, Jelley, J. From the order sustaining the demurrer, plaintiff appealed. Reversed.

Bert O. Loe, for appellant.

C. F. Keyes, A. H. David and *Le Roy Bowen,* for respondents.

DIBELL, J.

This is an appeal by the plaintiff from an order sustaining the demurrer to his complaint upon the ground of insufficiency of facts.

The plaintiff is the assignee of a cause of action for deceit claimed by one Gough against the defendants. The complaint alleges facts substantially as follows: Gough was a farmer living in Yellow Medicine county where he was breeding thoroughbred Duroc Jersey hogs. The defendants published a paper devoted to the interests of breeders. Gough and they became acquainted and had numerous business transactions. They had his confidence. They advised him that it would be to his advantage to buy a farm near Minneapolis and carry on his breeding there, and they volunteered to find a farm suitable for him.

[1]Reported in 184 N. W. 852.

Later they reported that they had found a suitable farm and recommended its purchase. It contained 53 acres and was owned by one Dutton. It was worth $22,000. Dutton owned a tract of 18 acres adjoining it worth $6,000.

They told Gough that the 53 acres was offered for $25,650; that it was worth that amount; that it could not be purchased for less, and that it could be sold at any time for that much. Gough looked at the land and purchased for $25,650. Dutton had listed the land for sale at $22,000, and was willing to sell at that price. He was willing to sell both tracts for $28,000. He was offering the 18 acre tract for $6,000. The defendants were negotiating for its purchase at the time. By getting Gough to pay $25,650 the defendants secured the 18 acres at $2,350, making a total of $28,000 to Dutton, for which he was all the time willing to sell both tracts. The purpose of the defendants, in making their false representations, was to get Gough to purchase the 53 acres at $25,650, so that they might get the 18 acres for $2,350 instead of $6,000, its worth. The complaint sufficiently alleges that the representations were falsely and fraudulently made to deceive the plaintiff, that he was ignorant of the facts, and that he relied upon the defendants. There was no privity of contract between him and the defendants.

The gist of the cause of action for deceit is fraud resulting in injury to the plaintiff, and whether a third party making the false representations makes or loses is not important, though an actual or anticipated profit may characterize his purpose and actions.

The well settled general rule is that an action of deceit cannot be predicated, under usual circumstances, upon a vendor's fraudulent misrepresentation of the value of the property sold. Men naturally exaggerate the value of what they own. They purposely exaggerate to induce a sale. The buyer knows this. He does not rely upon the vendor's statements of value under ordinary circumstances. The two deal at arms-length. The law, practical here as in other cases, does not build a cause of action against the exaggerating vendor in favor of the vendee foolishly relying upon interested misstatements of his vendor. The fraudulent false representation of a third person is upon a different

footing. The purchaser is not so on his guard, and the circumstances may be such that he relies upon the representation fraudulently made without fault so serious that the law will deny him relief for the injury coming from it.

The rule is recognized in Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360. And see Hubbell v. Meigs, 50 N. Y. 480; McBeth v. Craddock, 28 Mo. App. 380; Adams v. Collins, 196 Mass. 422, 82 N. E. 498. A case often cited is Medbury v. Watson, [6 Metc.] 47 Mass. 246, 39 Am. Dec. 726. Referring to the distinction between misrepresentations by the owner and by a third person the court said [p. 260]:

"In the one, the buyer is aware of his position; he is dealing with the owner of the property, whose aim is to secure a good price, and whose interest it is to put a high estimate upon his estate, and whose great object is to induce the purchaser to make the purchase; while in the other, the man who makes the false assertions has apparently no object to gain; he stands in the situation of a disinterested person, in the light of a friend, who has no motive nor intention to depart from the truth, and who thus throws the vendee off his guard, and exposes him to be misled by the deceitful representations.

In the present case, we think the averments in the declaration would not have supported an action, if the false representations had been made by the vendor to the vendees. But the representations were made by a third person, apparently disinterested, and who proposed to aid the plaintiffs in making the purchase, and to procure the estate for them for a price which he stated he knew that it cost, and which he affirmed it was worth. Such false affirmations and representations, having been made by a third person, with the intent to defraud, we hold are actionable."

The principle stated finds application here. The defendants had the confidence of Gough. He did not know that they were acting for their own advantage. They knew that he did not know. He was off his guard and took their statements. The fact that he went to the land before he purchased is not of controlling importance on the issue tendered by the demurrer. It will have its proper weight on the trial.

The facts alleged are such as to call for an answer and the demurrer should not have been sustained.

Order reversed.

IN RE ESTATE OF DAVID WOOD, DECEASED. H. S. WOOD AND ANOTHER v. DAVID CONNELL, EXECUTOR OF THE ESTATE OF DAVID WOOD, DECEASED.[1]

November 4, 1921.

No. 22,359.

Will — mental capacity of testator — undue influence.

In a will contest the evidence is *held* to sustain the findings of the trial court that testator was of sound and disposing mind, and was not induced to make the will by the undue influence of the principal legatee named therein, and, further, that the record presents no reversible error.

Horatio S. Wood and Victor Wood, brothers of deceased, filed objections in the probate court for Le Sueur county to the allowance of the last will of David Wood, deceased. From the order of the probate court admitting the will to probate, contestants appealed to the district court for that county. The appeal was heard before Olsen, judge of the Twelfth judicial district, acting in the place of Tifft, J., and he made findings and affirmed the order of the probate court. From an order denying their motion for a new trial, contestants appealed. Affirmed.

C. C. Kolars and *Moonan & Moonan,* for appellants.

Douglas, Kennedy & Kennedy, for respondent.

BROWN, C. J.

David Wood, late of Le Sueur county, died on June 5, 1919, leaving a last will and testament by which he made disposition of his property and effects at his death. He left surviving as heirs and next of kin

[1]Reported in 184 N. W. 955.

two brothers, a sister and a half sister; he had never been married, therefore left surviving no wife and children. Subject to a gift of one dollar to each of the brothers and the half sister, he devised and bequeathed all his property to his sister, Mary Ann O'Leary. The will was presented to the probate court with a petition for its allowance and probate. The brothers appeared and joined in objections to the allowance of the will on the grounds, among others, that decedent was mentally incompetent, and was induced to make it by the undue influence of Mrs. O'Leary, the principal beneficiary named therein. The probate court upheld the will and ordered it admitted to probate, from which an appeal was taken to the district court. A like conclusion was reached after trial in the district court, that court having found the grounds of contest not sustained by the evidence. Contestants moved for a new trial and appealed from an order denying the same.

The principal question presented by the assignments of error, is whether the findings of the trial court to the effect that decedent had mental capacity to make the will, and that there was no undue influence exerted by Mrs. O'Leary, are sustained by the evidence. One or two assignments relating to rulings on the admission of evidence present no serious question or ground for a new trial, and we pass them without comment.

The rule guiding our conclusion upon the main question, the sufficiency of the evidence to support the findings of the trial court, is well settled. Unless the evidence is clearly, or as sometimes expressed manifestly, against the findings, this court will not interfere. In the light of the rule we have read the record with care, and find no sufficient reason for disapproving the action of the trial court and therefore sustain the findings. An extended discussion of the evidence would serve no useful purpose.

Decedent had resided in Le Sueur county in the neighborhood where he died for a good many years. He was not above the intelligence of mankind in general, but rather below what is generally found in the common run of men. He had experienced some differences or disagreements with his brothers, but seems to have had full confidence in his sister, Mrs. O'Leary, and there existed between them the regard for

the welfare of each usually found between brother and sister; she befriended him, while he thought that his property was the motive behind whatever interest his brothers may have shown him. There was an attempt to place him under guardianship, but it failed. Wood v. Wood, 137 Minn. 252, 163 N. W. 297. We then held that the evidence there presented was sufficient to support a finding of competency on the part of decedent. In point of substance the evidence now before the court with one exception is about the same as on that appeal. After the remand of that cause, there was a motion for a new trial on the ground of newly discovered evidence, which was denied by the trial court. The order was reversed on appeal to this court, on the ground that the new evidence made a clear case of mental incompetency. The particular evidence then under consideration was a showing that decedent had disposed of all his property to his sister, without provision for his future support. The explanation given for the transaction was that decedent wanted the property to go to his sister in compensation for services rendered to him. It now appears that the transfer to his sister was a good faith transaction and under advice of counsel, not an overreaching by Mrs. O'Leary or the result of incompetence on the part of decedent. This fact changes the appearance of the transaction from the improvident character shown on the former appeal. Wood v. Wood, 140 Minn. 130, 167 N. W. 358.

Some 12 or 15 witnesses, neighbors who had known decedent for many years, testified to his average mental capacity; that he was qualified and competent to care for his property and effects. The sole witnesses to the contrary were his two brothers and their wives. The trial judge was confronted with each and all of them and was in favorable position to judge the credibility and weight to be given their testimony. Therefrom he found decedent competent to make the will, and further that no undue influence was exerted to bring the execution thereof about. And, as heretofore remarked, we find from the evidence, taken as a whole, no sufficient reason for interference. Walso v. Latterner, 143 Minn. 364, 173 N. W. 711; Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131; In re Hess' Will, 48 Minn. 504, 51 N. W. 614, 31 Am. St. 665;

Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260; Buck v. Buck, 126 Minn. 275, 148 N. W. 117.

Order affirmed.

FARMERS STATE BANK OF EVANSVILLE, MINNESOTA, v. CARL AUGUST FORSGREN AND OTHERS. C. H. LARSON, APPELLANT.[1]

November 4, 1921.

No. 22,360.

Partnership — use of name of retiring partner — extension of credit.

1. Where, on dissolution of a partnership, the retiring partner authorizes the continuing partners to use his name, they are authorized to use it for obtaining credit for the legitimate purposes of the partnership business, and a person having knowledge of such authority and extending such credit in reliance on it, may continue to extend credit, until he is notified that the authority has been withdrawn.

Same — notice to such partner of use of his name.

2. There were no errors in the rulings of the court on evidence nor in the charge of the court. The retiring partner was charged with knowledge of the use of his name in connection with transactions properly incident to the business.

Action in the district court for Douglas county to recover $800 upon two promissory notes. The case was tried before Taylor, J., and a jury which returned a verdict for the amount demanded. From an order denying his motion for a new trial, C. H. Larson appealed. Affirmed.

Constant Larson, for appellant.

Gunderson & Leach, for respondent.

HALLAM, J.

1. This action is brought against defendants Carl A. Forsgren, J. Walford Forsgren and C. H. Larson to recover on two promissory notes,

[1]Reported in 184 N. W. 966.

executed and signed by one of the defendants Forsgren, in the name of Forsgren Brothers and Larson. Defendant Larson defends on the ground that the note was signed without his authority. The jury found for plaintiff and defendant Larson appeals.

In January, 1902, defendant Larson was engaged in the mercantile business at Evansville, Minnesota. At that time he formed a partnership with the defendants Forsgren under the name of Forsgren Brothers and Larson, and together they conducted the business until 1908. At that time the partnership was dissolved. Notwithstanding the dissolution of the partnership, defendant Larson told the Forsgrens "you can use my name for a while," and the Forsgrens with his consent did continue to use Larson's name after the dissolution of the partnership. This was done for the purpose of enabling the Forsgren Brothers to obtain credit. Up to the spring of 1911 they ordered most of their goods in the name of Forsgren Brothers and Larson. During the whole period of the existence of the partnership, the defendants carried a deposit account in plaintiff's bank in the name of Forsgren Brothers and Larson, and the use of that name continued in this connection until after the giving of the notes sued on. Plaintiff's officers knew of the dissolution of the firm. They also knew that Larson had thereafter permitted the Forsgrens to use his name. There is evidence that upon one occasion Larson was asked by plaintiff's cashier if the Forsgrens had authority to use his name and that he answered "yes." The indebtedness which is now evidenced by the notes in suit arose out of two loans of money negotiated by the Forsgrens and used in the business prior to 1911.

The original notes were renewed when due. There were several subsequent renewals. All the notes were executed by one of the Forsgren brothers in the name of Forsgren Brothers and Larson.

It seems very clear that defendant Larson was liable on the original notes, not on the theory that he was a partner or that he held himself out as a partner, but on the theory that he had in terms authorized the Forsgrens to use his name. As we understand the authority given, it was an authority to use his name for the purpose of obtaining credit

for the legitimate purposes of the partnership business, whether credit was asked of a banking institution or of a mercantile concern.

Before the notes sued on were given, defendant Larson had given the Forsgrens directions to discontinue the use of his name. We are of the opinion that this did not relieve him from liability. In view of the authority given by Larson to the Forsgrens and of the fact that the bank knew of it and acted upon it, we are of the opinion that the authority would continue until the bank received notice that it had been withdrawn. The court charged the jury in substance to this effect, and the jury by its verdict must have found that the bank had no such notice. We think the evidence is sufficient to sustain that finding. Plaintiff's cashier so testified, and it appears also that, during all of the time up to the giving of these notes, the bank account was continued in the name of Forsgren Brothers and Larson, and deposit slips and checks were made in that name and that defendant Larson received some of these checks. In addition to these facts there is the significant fact that defendant Larson was liable on the original indebtedness, and there is nothing in the case to show that his liability had ceased.

2. Exception is taken to certain rulings of the court on admission of evidence. We have examined them with care and hold them not well taken.

It was proper to show the manner in which the Forsgrens used Larson's name in their transactions with plaintiff, though Larson did not have knowledge of every form in which it was used. Having authorized the use of his name, he was charged with knowledge of their use of it in connection with transactions properly incident to the business.

It was proper to show the purpose for which the money was borrowed, that is, to show that it was borrowed for a partnership purpose.

Defendant Larson's letter of instruction to the Forsgrens to discontinue the use of his name was not important in the absence of proof that the bank had notice of it.

The charge of the court was in accordance with the rules above stated. We find in it no error.

Order affirmed.

ANDREW NORDSELL v. C. E. NEILSEN AND ANOTHER. C. R. WILKINSON, APPELLANT.[1]

November 4, 1921.

No. 22,366.

Set-off and counterclaim — claims against assignor of chose in action.

1. A chose in action assigned before maturity is, in the hands of the assignee suing thereon, subject to offsets on account of claims or obligations against the assignor acquired by the defendant before notice of the assignment.

Exclusion of evidence error.

2. It was error to exclude proof that, under a separate oral contract made at the same time the contract sued on was signed, a certain amount was due and payable to defendants prior to notice of the assignment.

Exclusion of offset error.

3. The note of one of the defendants was provable as an offset.

Action in the district court for Ramsey county to recover $375 due on contract. The case was tried before Hanft, J., who when plaintiff rested denied defendant Neilsen's motion to dismiss the action, made findings and ordered judgment in favor of plaintiff for the amount demanded. From an order denying his motion for a new trial, C. R. Wilkinson appealed. Reversed.

Walter L. Chapin, for appellant.

George Nordlin, for respondent.

HOLT, J.

Oliver Nolan had invented a machine for molding concrete. On April 22, 1913, he made a written contract with defendants, as partners, whereby the latter were licensed to manufacture and vend the machines, and, for the license to so do, they agreed to pay Nolan $25 for each ma-

[1]Reported in 184 N. W. 1023.

chine manufactured, "and further that the amount of license fee upon the molding machines to be manufactured by them within one year from the date of this agreement shall not be less than three hundred and seventy-five dollars." On December 13, 1913, Nolan, to secure the repayment of money loaned to him by plaintiff, transferred the contract to the latter and particularly the payment of the said $375. This action to recover that amount was brought by the assignee. Defendants answered separately and alleged set-offs. The court found for plaintiff, and the defendant Wilkinson appeals from the order denying a new trial.

The court excluded evidence offered of the two set-offs pleaded, and this presents the only assignments of error. The appellant alleged that, prior to the making of the contract with Nolan, the defendant Neilsen had made five machines for Nolan at the agreed price of $75 each; that Nolan was unable to pay for them; that thereupon the contract in suit was made, and it was further agreed at that time, between Nolan and the defendants, that "Nolan should within a reasonable time dispose of the five machines at $125 each and should pay these defendants therefrom the sum of $100 for each machine, out of which should be paid the initial cost of $75 and the balance applied on the sums, if any, due under the terms of" the contract in suit, and that Nolan never took possession of or sold any of the machines. The excluded offer of proof was substantially in accord with the allegations.

It is to be noted that the contract assigned to plaintiff was executory. It contemplated that defendants should proceed to manufacture the machines. If they failed, as they did, nothing came due until the end of the year, when the minimum royalty was payable; hence, it is argued, the claim is not subject to any set-off. Bradley v. Thompson Smith's Sons, 98 Mich. 449, 57 N. W. 576, 23 L.R.A. 305, 39 Am. St. 565, is cited, which holds that a creditor cannot set off, against the assignee of a chose in action not due at the time of the assignment, a claim that was mature before that time. But the contract there assigned was a logging contract wholly executory, and the court says of it that it is "but an executory promise to pay upon the performance of something else. His right of action, when it accrues, may be a mere action for

damages for a breach of contract. He could not set off such right, if the promisor should sue him upon the cross-demand, and it is a matter which may never become a debt." However, the Michigan statute (3 How St. § 7365) does not read like ours, but provides that a defendant's demand may be set off "if the demand be such as might have been set off against such plaintiff or such assignee while the contract belonged to him." The court in the case cited seems to hold that assignee as used in the statute means the assignor of the claim.

Our statute, section 7675, G. S. 1913, differs. It reads: "If a thing in action be assigned, an action thereon by the assignee shall be without prejudice to any set-off or defense existing at the time or before notice of the assignment."

California has a similar statute, and in St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876, it was held that against a demand not due at the time defendant received notice of the assignment, a set-off may be had, the demand and set-off being both due at the time the suit was instituted. The court says: "A debtor may fortify himself against the coming suit of his creditor by the purchase of any cross-demands which may be counterclaimed when that suit shall come, and between them an assignee has no standing until he shall have given notice of the assignment. * * * The relative times at which the notes in the case at bar matured is of no consequence, since they were due at the commencement of the action." The chose in action there was a nonnegotiable note not due when assigned, and neither was the claimed set-off.

In Martin v. Pillsbury, 23 Minn. 175, it was held that the defendant had the right of set-off against the chose in action assigned to plaintiff, even though not due when the defendant received notice of the assignment. In that case authorities from New York were relied on to the point that no proper set-off could be had, since the claim sued on had not matured at the time the notice of the assignment was given, but the court called attention to the difference between our statute and that of New York, the latter having the clause contained in the Michigan statute above quoted. We therefore hold that, although the contract had not matured at the time it was assigned, that fact did not deprive

defendants of any set-off they then had or might have acquired against the assignor before notice of the assignment.

Counsel for plaintiff cites 22 Am. & Eng. Enc. (1st ed.) 301; 24 R. C. L. § 46, Set-Off & Counterclaim, and 34 Cyc. 746. The text, to the effect that unless the chose assigned and the set-off claimed are both due when the transfer is made the set-off is not available, is supported by decisions from New York, Michigan, Montana and Ohio. The clause quoted from the New York statute in Martin v. Pillsbury, supra, is common to the statutes of Michigan and Montana, and the Ohio court construes their statute to mean the same as that of New York.

The contract transferred to plaintiff is not contingent. Three hundred and seventy-five dollars became due and payable absolutely at the end of the year, and it may be noted that it was assigned to plaintiff to the extent of that amount only.

The claimed set-off was matured, under the pleading and offer of proof, when the assignment was made. To constitute an off-set, however, the claim or demand must be liquidated, or susceptible of computation. 24 R. C. L. title Set-Off & Counterclaim, § 60. We are inclined to think that at least as to the amount that should be applied upon the contract plaintiff holds, viz. $125, or $25 for each of the five machines Nolan agreed to sell, the claimed set-off is liquidated and certain.

The other set-off pleaded and of which proof was excluded was a promissory note made by Nolan to the defendant Wilkinson for $100, dated October 24, 1912, and due six months after date. It is clear that this was a proper set-off under the interpretation of section 7675, G. S. 1913, herein adopted, provided a partner may off-set his separate claim against an obligation sought to be enforced against his partnership. We think he may do this. The contract sued on was the joint and several obligation of defendants, and plaintiff asks for a several judgment against them. A several judgment may be entered on a partnership obligation against one partner. Section 7916, G. S. 1913.

We think there was error in excluding proof of the set-offs pleaded. The order is reversed.

CHARLES POWER v. AUGUST NORDSTROM AND OTHERS.[1]

November 4, 1921.

No. 22,375.

License — motion pictures may be licensed.

1. Though a lawful business, the exhibition of motion pictures may be licensed and regulated by the state and the political subdivisions thereof in the exercise of the police power.

Sunday — public motion pictures may be prohibited on that day.

2. In the exercise of the discretion delegated to village councils by sections 1268, 1269, G. S. 1913, they may ordain that there shall be no public exhibitions of motion pictures within the village on Sundays.

Same — regulation of business not observance of Sabbath.

3. Such an ordinance is not aimed to secure the observance of the Sabbath day, but to regulate a business, and is not in conflict with the general law or public policy of the state.

Action in the district court for Chisago county to restrain defendant village officers from enforcing section 9 of a certain ordinance of the village of North Branch. Defendants' demurrer to the complaint was overruled and the question presented by the demurrer certified as important and doubtful, Searles, J. From the order overruling the demurrer, defendants appealed. Reversed.

Alfred P. Stolberg, for appellants.

Moore, Oppenheimer & Peterson, for respondent.

LEES, C.

The village of North Branch was incorporated under the provisions of chapter 9, R. L. 1905. It has less than one thousand inhabitants.

Section 727, R. L. 1905, now section 1268, G. S. 1913, grants power to village councils to adopt such ordinances as they deem expedient for certain enumerated purposes. Among such purposes is preventing or

[1]Reported in 184 N. W. 967.

licensing and regulating the exhibition of circuses, theatrical performances or shows of any kind. Section 1269, G. S. 1913, contains a similar grant of power coupled with a proviso authorizing village councils to refuse to grant a license "where in their opinion the public interests of the citizens of the village require it."

In October, 1920, the village council of North Branch adopted an ordinance entitled "an ordinance to regulate and license peddlers, hawkers, auctioneers, transient merchants, amusements and shows." It required one following such an occupation or engaged in such a business within the village to take out a license and pay a specified license fee. Section 9 of the ordinance reads:

"The exhibition or attempt to exhibit in said village of any moving picture show, show, circus, menagerie, vaudeville or theatrical entertainment for the amusement of the public on Sunday is prohibited and forbidden."

Plaintiff applied for and was granted a license to operate a motion picture theater and paid the required license fee. The village officers threatened to arrest and prosecute him under the ordinance if he exhibited motion pictures on Sunday, and he has accordingly desisted, thereby sustaining a financial loss. He is the owner of a modern and well equipped theater, where he exhibits motion pictures in an orderly manner to respectable audiences. The pictures are of moral character, and tickets are sold only in the vestibule of the theater without any calling out or announcement of the exhibition or of their sale.

Setting out these facts in his complaint, plaintiff brought this action to restrain the village officers from enforcing section 9 of the ordinance, on the ground that it is illegal and void. The defendants demurred on the ground that the complaint failed to state a cause of action, the demurrer was overruled, the court certifying that the question presented was doubtful, and defendants appealed from the order.

No question is or could be raised about the meaning of the word "shows" as used in the statute. Clearly enough it is sufficiently broad to include exhibitions of moving pictures. 38 Cyc. 258. It must be conceded that the motion picture business is a lawful business. Nevertheless it is a business which is subject to regulation by the state by vir-

tue of its police power and by the political subdivisions of the state to which the power has been delegated by the legislature. 2 Dillon, Mun. Corp. § 664; 38 Cyc. 255, 258; Mutual Film Corp. v. Ohio Indust. Com. 236 U. S. 230, 244, 35 Sup. Ct. 387, 59 L. ed. 552, Ann. Cas. 1916C, 296; Greenberg v. Western Turf Assn. 148 Cal. 126, 82 Pac. 684, 113 Am. St. 216; note to Zucarro v. State, L.R.A. 1918B, 361.

This court has twice declared that places of public amusement, such as theaters and motion picture houses, are proper subjects for police regulation and control. State v. Schaffer, 95 Minn. 311, 104 N. W. 139; Higgins v. La Croix, 119 Minn. 145, 137 N. W. 417, 41 L.R.A. (N.S.) 737. The reasons leading to that conclusion are convincingly stated in the latter case and need not be repeated.

Possibly the power to license and regulate shows includes the power to prohibit them. State v. Redington, 119 Minn. 402, 138 N. W. 430. But, assuming it does not, can it be said that to forbid the carrying on of the business at specified times, as on Sundays or between certain hours of the day, is beyond the power of a municipal corporation?

Under a grant of police power to license and regulate a business, the municipal authorities have power to determine where and within what limits the business may be conducted. In re Wilson, 32 Minn. 145, 19 N. W. 723. They may impose reasonable restrictions as to the time, place and manner of conducting the business. State v. Barge, 82 Minn. 256, 84 N. W. 911, 53 L.R.A. 428. They may prohibit exhibitions of motion pictures in portions of a city in which for reasons of public welfare it is undesirable to have them. State v. Redington, supra. An ordinance, enacted under a grant of power to license billiard and pool halls, may impose any reasonable conditions or terms to make the license efficacious as a police regulation. The licensee may be required to keep an orderly house, or to keep it closed on certain days and during certain hours at night. State v. Pamperin, 42 Minn. 320, 44 N. W. 251. That was a case where the ordinance required billiard and pool halls to be kept closed on Sundays and after certain hours at night. Generally speaking a city, under its authorized police power, may regulate any business the unrestrained pursuit of which might affect injuriously the public health, morals, safety or comfort. City of St. Paul

v. Kessler, 146 Minn. 124, 178 N. W. 171. And, in respect to theatrical exhibitions and amusements of a similar character, a larger discretion is recognized than in the case of ordinary trades, because they are liable to degenerate into nuisances and also because they require more police surveillance. City of Duluth v. Marsh, 71 Minn. 248, 73 N. W. 962. It is our opinion that in the exercise of such discretion pursuant to the powers granted by sections 1268, 1269, G. S. 1913, a village may ordain that motion picture exhibitions shall not be given on Sundays, unless such a provision in an ordinance is inconsistent with the Constitution or general laws of the state or is unreasonable.

The legislature, in the exercise of police power, may prohibit all manner of labor and business on Sundays, except works of necessity or charity, and may delegate authority to municipal corporations to enact ordinances with like prohibitions: State v. Ludwig, 21 Minn. 202. Sunday laws are generally sustained on the theory that there should be one day of rest in each week to promote the moral and physical well-being of society, and hence the enactment of such laws falls within the scope of the police power of the state. State v. Petit, 74 Minn. 376, 77 N. W. 225; State v. Justus, 91 Minn. 447, 98 N. W. 325, 64 L.R.A. 510, 103 Am. St. 521, 1 Ann. Cas. 91; State v. Weiss, 97 Minn. 125, 105 N. W. 1127, 7 Ann. Cas. 932; State v. Dean, 149 Minn. 410, 184 N. W. 275. But it is urged that an ordinance requiring motion picture houses to close on Sundays is inconsistent with the general laws of the state—section 8753, G. S. 1913, as construed in State v. Chamberlain, 112 Minn. 52, 127 N. W. 444, 30 L.R.A.(N.S.) 335, 21 Ann. Cas. 679, and followed in Houck v. Ingles, 126 Minn. 257, 148 N. W. 100. Counsel for respondent say that, stripped of all camouflage, the ordinance is simply and solely Sunday legislation in direct conflict with and an attempt to override the general statutes and the well settled public policy of the state. We do not regard it as legislation of that character. It is not the aim of the ordinance to compel the observance of the Sabbath day by the people of North Branch. Its only aim is to regulate the several occupations and kinds of business to which it refers. It is no more Sunday legislation than is section 3141, G. S. 1913, prohibiting the sale

of intoxicating liquors on Sundays or the same provision commonly found in city and village ordinances regulating the liquor traffic.

The contention that section 9 conflicts with the general law and public policy of the state is supported by a skilful and plausible argument, in substance this: Section 8753, G. S. 1913, is a legislative declaration of public policy relative to Sunday observance, which prohibits the doing of certain things on Sunday, but not the indoor exhibition in an orderly manner of motion pictures. By failing to prohibit such exhibitions the legislature has impliedly sanctioned them, while section 9 of the ordinance expressly prohibits them.

We have examined all the cases cited in support of this contention, as well as others dealing with the vexed question of when a local ordinance must be held inconsistent with the general law. The conclusion we have reached is that the contention should not be sustained.

It is elementary that an ordinance must not be repugnant to, but in harmony with, the laws enacted by the legislature for the government of the state. It cannot authorize what a statute forbids or forbid what a statute expressly permits, but it may supplement a statute or cover an authorized field of local legislation unoccupied by general legislation. Every business and occupation is subject to the reasonable exercise of the police power of the municipality where it is carried on, and, in the exercise of the power, a city or village may regulate that which the state has failed to regulate. There can be no conflict between a statute and an ordinance, where there is no statute covering the subject matter of the ordinance. Such is the case here. The statute is silent upon the subject of the exhibition of motion pictures on Sundays. It does not prohibit their exhibition. Neither does it expressly permit it, as it does the playing of baseball on Sunday between certain hours. By refraining from legislating on the subject, and by authorizing villages not only to regulate the business but to refuse to grant licenses and so prevent such exhibitions, the legislature has treated the whole matter as one properly within the domain of the police power of villages. The public policy of the state should be determined by the legislature and not by the courts. We see no reason why reasonable local regulations, adapted to local conditions and in harmony with the wishes

of a majority of the inhabitants of a village, should not be permitted to stand, and such has been the opinion of the attorney general. Opinion 637, Rep. of Atty. Gen. 1916.

Previous decisions of this court, cases in other states and the text-writers have expressed views which support the conclusion we have reached. State v. Ludwig, supra; Evans v. City of Redwood Falls, 103 Minn. 314, 115 N. W. 200; City of Mankato v. Olger, 126 Minn. 521, 148 N. W. 471; State v. City of Duluth, 134 Minn. 355, 159 N. W. 792, Ann. Cas. 1918A, 683; MacPherson v. Village of Chebanse, 114 Ill. 46[1]; City of Clinton v. Wilson, 257 Ill. 580[2]; McQuillin, Mun. Corp. §§ 647, 878; 19 R. C. L. 803; 25 R. C. L. 1419. Whether it is wise or unwise to prohibit theatrical and other like performances on Sundays, is a question with which we are not concerned. North Branch has local self government. If its people want an ordinance of this kind, they may have it. If they no longer want it, they can have it repealed. For the reasons stated we are constrained to hold that the learned trial judge erred in overruling the demurrer and therefore the order appealed from must be and is reversed.

HALLAM, J. (dissenting).

In my opinion the ordinance in question, so far as it relates to picture shows, is not regulation but Sunday legislation and is repugnant to the statutes of the state as construed in State v. Chamberlain, 112 Minn. 52, 127 N. W. 444, 30 L.R.A.(N.S.) 335, 21 Ann. Cas. 679, and that it is therefore invalid. This is in accordance with the New York decisions on similar legislation. People v. Lent, 166 App. Div. 550, 152 N. Y. Supp. 18; People v. Lent, 215 N. Y. 626, 109 N. E. 1088.

[1] 28 N. E. 454, 55 Am. Rep. 857. [2] 101 N. E. 192.

PARKE, DAVIS & COMPANY v. HARRY D. MEWHIRTER. E. J. YOUNG AND ANOTHER, GARNISHEES. ANDREW G. DUNLOP, RECEIVER.[1]

November 4, 1921.

No. 22,392.

Garnishment — trial of issues made upon disclosure.

1. If a plaintiff in a garnishment proceeding desires to take issue on the disclosure of the garnishee, or if there be a claimant of the fund or property garnished, our statutes contemplate a trial of the issue upon evidence as in ordinary litigated actions.

Bankruptcy act inapplicable to controversy in state court, when.

2. The provision of the bankruptcy act, giving a bankruptcy court power to determine, in a summary manner, certain controversies over right to property of the bankruptcy, is not important in the determination of a controversy in a state court where the bankruptcy court has not acted in the premises.

Insolvency of garnishee.

3. The showing of the receiver in bankruptcy that the bankrupt was insolvent at the time of the commencement of a garnishment proceeding was prima facie sufficient.

Action in the district court for Hennepin county. The facts are narrated in the first paragraph of the opinion. From an order, Leary, J., dismissing the garnishment proceedings, plaintiff appealed. Reversed.

Lightner & Young, for appellant.

Charles Burke Elliott and *George W. Caldwell,* for respondents.

HALLAM, J.

1. On December 24, 1920, plaintiff sued defendant and commenced garnishment proceedings. The garnishees were at that time in possession of property belonging to defendant. On January 6, an involuntary

[1]Reported in 185 N. W. 648.

petition in bankruptcy was filed against defendant and on January 29, 1921, he was adjudged bankrupt and a receiver appointed. On January 31 the garnishees made their disclosure. Thereupon the receiver made application to the court, showing the adjudication of bankruptcy and his appointment as receiver, and representing that the possession of this property was withheld from the receiver by the garnishees and asked that the garnishment proceedings be dismissed. The hearing was upon affidavits. Plaintiff objected that the court could not properly dismiss the garnishment proceeding before plaintiff's rights acquired thereunder had been adjudged void in a plenary suit. The court dismissed the garnishment and made a finding, that the receiver "is in possession of the property against which this garnishment lien is being claimed and asserted." On what showing this finding was made does not appear.

We think the contention of plaintiff should have been sustained. Our statutes very clearly outline the practice in garnishment proceedings. If the plaintiff desires to take issue on the disclosure of the garnishee, he may file a supplemental complaint for that purpose. G. S. 1913, § 7870. If there be a claimant of the fund or property garnished, the claimant is made a party to the proceeding. G. S. 1913, § 7869. In both cases the statute contemplates a trial, not in a summary manner upon affidavits, but upon evidence taken as in ordinary litigated actions. G. S. 1913, § 7870; Donnelly v. O'Connor, 22 Minn. 309; Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794, 6 L.R.A. 338, 18 Am. St. 495. We think plaintiff's objection was sufficient to preserve its rights in these particulars.

2. Reference is made to the Federal decisions holding that, where property is in custody of a bankruptcy court, the court may in a summary manner determine the validity of claims asserted against it. First Nat. Bank v. Chicago Title & Trust Co. 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051; Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 142 C. C. A. 433. It is a well-settled principle that any court, having custody of property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. This does not arise out of any provision of the bankrupty act. The

principle is applicable to all courts, Federal and state. Murphy v. John Hofman Co. 211 U. S. 562, 569, 570, 29 Sup. Ct. 154, 53 L. ed. 327. The fact that, under the bankruptcy act, this jurisdiction may be exercised in the bankruptcy court in a summary manner, is not very important here. That court has not acted in the premises, and, until it does do so, the question of its power to act does not concern us here, nor does the question of proper practice in that court concern us.

It may be noted that the property was not in the custody of the bankruptcy court at the time the motion to dismiss the garnishment was made. It is at least doubtful whether the summary jurisdiction of that court could be exercised under those conditions. Fountain v. 624 Pieces of Timber, 140 Fed. 381; In re New England Breeder's Club, 175 Fed. 501.

3. In this view of the case some of the questions argued become immaterial. We may say, however, that plaintiff's contention that the receiver failed to make a prima facie showing of insolvency of defendant at the time the garnishment proceeding was commenced is not well taken. The affidavits submitted, taken altogether, were, in our opinion, sufficient for that purpose.

Order reversed.

EMIL H. SCHMIDT v. C. J. MINOR, SOLE TRADER, AND OTHERS.[1]

November 4, 1921.

No. 22,434.

Liability of master for torts of servant.

1. The facts stated in the opinion bring this—an action for damages for assault and battery—within the rule that a master is responsible for the torts of his servant in the course and within the scope of his employment with a view to the furtherance of the master's business and not for a purpose personal to himself.

[1]Reported in 184 N. W. 964.

Assault and battery — exemplary damages against master.

2. Such facts warranted the jury in their discretion in awarding exemplary damages. Such damages may be recovered from the master, even though he did not participate in, authorize or ratify his servant's acts, if done in the course of the performance of the duties of his employment and within the scope thereof.

Verdict not excessive.

3. The damages were not excessive.

Action in the district court for Ramsey county to recover $5,000 for assault and battery. The case was tried before Hanft, J., who when plaintiff rested granted the motion of the Minor Realty Company to dismiss the action as against it, and at the close of the testimony denied the motion of C. J. Minor for a directed verdict, and a jury which returned a verdict for $550. From an order denying their motions for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

Arthur E. Shanahan and *F. W. Murphy,* for appellants.

Albin E. Bjorklund, for respondent.

LEES, C.

This is an action for damages for assault and battery committed on plaintiff by the defendant Reid Minor. Plaintiff recovered a verdict for $550, and defendants appealed from an order denying their motion for a new trial.

The defendant C. J. Minor was the owner and proprietor of the Aberdeen hotel in the city of St. Paul. The defendant Reid Minor is his son and was employed by him in the hotel. Plaintiff is a cook who was employed in the hotel when he was assaulted.

The principal grounds on which a reversal is asked are: (1) That the defendant C. J. Minor is not answerable for the acts with which his son is charged; (2) that the court erred in instructing the jury that they might award exemplary damages; (3) that the damages are excessive and were given under the influence of passion and prejudice.

1. According to the testimony of Reid Minor, at the time of the assault, and for several years before, he was employed to keep the books

and look after his father's interests generally. He made out the menus, rented rooms, occasionally hired and discharged help and had supervision over the employes. In his father's absence he had general supervision over the hotel. Plaintiff began to work on August 26, 1919, as a second cook. He had supposed he was to receive $4 and work 8 hours a day. The chief cook told him he was to work on a split shift of 9 hours a day. He was dissatisfied and gave notice he would not stay after the second day, on August 27. At about 5 o'clock in the afternoon of that day Reid Minor, having learned that plaintiff was going to leave, went to the kitchen to try to persuade him to stay until after the State Fair, which was to be held about a week later. He was unsuccessful. There was an exchange of profane and abusive language and finally plaintiff was told to leave at once. He picked up his tools, left the kitchen and started for the dressing room to change his clothes. Minor followed him to see, as he testified, "that he didn't take what didn't belong to him; that is my duty there." It was then that the alleged assault was committed. Minor was victorious in the combat, and, when he released plaintiff after the struggle was over, the latter seized a knife and struck at him, hitting his hand with the back of the blade. According to plaintiff's testimony Minor was the aggressor up to that point in the affray. The facts outlined bring the case within the rule that a master is responsible for the torts of his servant in the course and within the scope of his employment with a view to the furtherance of the master's business and not for a purpose personal to himself. Sina v. Carlson, 120 Minn. 283, 139 N. W. 601; Burnham v. Elk Laundry Co. 121 Minn. 1, 139 N. W. 1069; Roemer v. Jacob Schmidt Brewing Co. 132 Minn. 399, 157 N. W. 640, L.R.A. 1916E, 771; Sunderland v. Northern Express Co. 133 Minn. 158, 157 N. W. 1085, L.R.A. 1916E, 1151.

2. The circumstances under which the assault was committed, if plaintiff related them truthfully, were such that the jury might find the assault was wanton and malicious; that, angered by plaintiff's refusal to stay, Minor heaped abuse upon him, and when plaintiff returned insult for insult he was attacked and beaten. If plaintiff's version of the affair was correct, the case was one where it was within the discre-

tion of the jury to award exemplary damages. Baumgartner v. Hodgdon, 105 Minn. 22, 116 N. W. 1030; Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126, and such damages might be assessed against C. J. Minor as the employer of his son, although he was not present and did not authorize or ratify his son's acts.

There is some conflict in the authorities as to when and how far a principal or master is liable for exemplary damages for the torts of his agent or servant. The Supreme Court of the United States has held that guilty intention on the part of the defendant is required, in order to charge him with exemplary damages; that since such damages are awarded not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, they can only be awarded against one who has participated in the offense. Lakeshore, R. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. ed. 97. In some jurisdictions the rule is that such damages may not be recovered from the principal or master, unless he participated in the acts of his agent or servant or previously authorized or subsequently ratified them. 8 R. C. L. p. 597, § 143; 17 C. J. p. 989, § 290. In other jurisdictions the rule is that, if the agent or servant is liable for exemplary damages, such damages may be recovered from the principal or master, even though the acts of the agent or servant were not authorized or ratified, provided of course they were done by the agent or servant in the course of the performance of the duties of his employment and were within its scope. 8 R. C. L. p. 599, § 144; 17 C. J. p. 991, § 290. This court has adopted the rule last above stated. Peterson v. Western Union Tel. Co. 75 Minn. 368, 77 N. W. 985, 43 L.R.A. 581, 74 Am. St. 502; Anderson v. International Harvester Co. 104 Minn. 49, 116 N. W. 101; Hammer v. Forde, 125 Minn. 146, 145 N. W. 810; Helppie v. N. W. Drainage Co. 127 Minn. 360, 149 N. W. 461; Daigle v. Summit M. Co. 144 Minn. 178, 174 N. W. 830.

The alignment of the states on opposite sides of the question is given in Voves v. Great Northern Ry. Co. 26 N. D. 110, 143 N. W. 760, annotated in 48 L.R.A.(N.S.) 35. It was remarked in that case that the rule permitting the award of exemplary damages in any case is an

anomaly in the law with no sound reason behind it—"a hybrid between a display of ethical indignation and the imposition of a fine."

Be that as it may the doctrine is too deeply implanted in the law to be uprooted for no better reason than that it is illogical. Justification for the extension of the doctrine to include a master whose servant wantonly and maliciously assaulted another, is thus stated in N. W. Boyer & Co. v. Coxen, 92 Md. 366, 48 Atl. 161: The master selects his servants and ought to know what sort of persons he is investing with authority to act for him. A business of any considerable proportions is for the most part conducted through agents and servants and if the principal or master cannot be held for exemplary damages, in many instances it would be equivalent to abolishing that character of damages, for a judgment against an employe is often uncollectable and no punishment to the wrongdoer. Somewhat similar was the reasoning of this court in Peterson v. Western Union Tel. Co. supra.

We hold there was no error in the court's refusal to instruct the jury that in no event could they assess exemplary damages against C. J. Minor.

3. The trial court in a memorandum following the order denying a new trial said he took little stock in plaintiff's assertion that he had been severely injured or in the claim that the assault was malicious, but was satisfied that, although the jury was generous in awarding damages, neither passion nor prejudice had entered into the verdict, and therefore it should not be set aside or reduced. We find nothing in the record warranting us in interfering with this exercise of the rather broad discretion which a trial court possesses in acting on an application to vacate or reduce a verdict on the ground that it is excessive.

The other assignments of error have not escaped our attention. None are of sufficient merit to require discussion. The order denying a new trial is affirmed.

HALLAM, J., took no part.

STANLEY BOZICH AND ANOTHER v. FIRST STATE BANK OF BUHL, MINNESOTA.[1]

November 4, 1921.

No. 22,445.

Mortgage upon homestead — false representation.

1. The evidence sustains a finding that the plaintiff falsely represented to the defendant that he was unmarried, and thereby obtained a loan upon the faith of a mortgage upon his homestead, in which his wife did not join.

Estoppel against husband after death of his wife.

2. A mortgage by a married man upon his homestead is void unless his wife joins, but, when the husband falsely and fraudulently represents to the mortgagee that he is unmarried, and thereby gets a loan upon the faith of a mortgage without his wife joining, he will not be heard in a court of equity, after the death of his wife, he remaining the owner, to assert its invalidity, but will be *held* estopped by his misrepresentation.

Action in the district court for St. Louis county to cancel a mortgage on a homestead. The answer alleged the mortgage was procured through the false representation of Stanley Bozich. The case was tried before Fesler, J., who made findings and ordered judgment in favor of defendant. From an order denying his motion for amended findings or for a new trial, Stanley Bozich appealed. Affirmed.

Carl A. Onkka, O. J. Larson and *George S. Sjoselius,* for appellant.

Austin & Austin and *Charles T. Wangensteen,* for respondent.

DIBELL, J.

Action by the plaintiffs, husband and wife, to cancel a mortgage made by the plaintiff Stanley Bozich, his wife not joining, on their homestead. There were findings for the defendant, and the plaintiff Stanley

[1]Reported in 184 N. W. 1021.

Bozich appeals from the order denying his motion for a new trial. Mrs. Bozich died after the commencement of the action. The questions are:

(1) Whether Bozich secured the loan for which the mortgage was given by fraudulently representing that he was unmarried.

(2) If so, whether he will now be heard to assert that the mortgage is void because his wife did not join, or is estopped to assert its invalidity.

1. The plaintiffs were married on November 27, 1914. Helda died on January 7, 1919. This was after the commencement of this action but before issue joined.

On December 22, 1914, Bozich mortgaged to the defendant two lots in Kinney to secure a loan of $3,000. Helda did not join. The property was their homestead. Bozich represented to the bank in his application for the loan, and in response to a direct question, that he was a single man, and it was so recited in the mortgage and in the acknowledgment. The defendant believed and relied upon such representation and by it was induced to make the loan and take the mortgage.

The facts stated were found by the trial court from evidence amply sustaining them. Bozich knew that his wife should sign. Whether he knew the full legal effect of a failure to sign when the mortgage was upon the homestead is not apparent. He knew that the bank supposed it was getting a good lien and his representation was necessarily fraudulent.

2. A mortgage by the owner of the homestead without the joinder of the other spouse is void. G. S. 1913, § 6961. The defendant's claim is that Bozich, his wife having died, and he still owning the property, cannot now be heard in a court of equity to say that the mortgage was void, and that he is estopped to assert its invalidity.

In reviewing the facts and applying the law the trial court said:

"Stanley Bozich unquestionably perpetrated a fraud on the defendant. The purpose of estoppel is to prevent fraud resulting in injustice. If any state of facts justifies the application of the doctrine of estoppel it ought to be applied here. Stanley obtained $3,000 from the defendant by falsely representing that he was a single man. He now asks the court to release the mortgaged property from the lien of the mort-

gage without requiring him to pay the loan. His wife is dead. No one will be benefited by such decree but the party who perpetrated the fraud. The courts cannot be used for such a purpose."

The language quoted forecasts the correct result. Many cases, speaking directly to the facts presented and with emphasis upon the importance of preserving unimpaired the homestead right, have used language from which on casual view an inference might be drawn that an estoppel cannot be invoked at all when a spouse fails to sign. Usually in these cases the estoppel was predicated upon covenants in the conveyance. In Alt v. Banholzer, 36 Minn. 57, 29 N. W. 674, the court was unable to agree whether a husband, who mortgaged the homestead, his wife not joining, representing to the mortgagee that he was unmarried, was estopped, after a divorce, from denying the validity of the mortgage, and the question was left undecided. It has not been decided since.

There are cases holding or implying that an estoppel may be invoked from facts apart from the covenants. Lucy v. Lucy, 107 Minn. 432, 120 N. W. 754; Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094; Bullock v. Miley, 133 Minn. 261, 158 N. W. 244; Esty v. Cummings, 75 Minn. 549, 78 N. W. 242; Law v. Butler, 44 Minn. 482, 47 N. W. 53, 9 L.R.A. 856. It is held that covenants of title in a deed of the homestead, the wife not joining, will not work an estoppel against the husband. Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. 681. This is not such a case. The defendant does not predicate the estoppel which it invokes upon the covenants in the mortgage. Upon inquiry made Bozich fraudulently represented that he was unmarried and by his misrepresentation induced the defendant to part with $3,000 upon the faith of the proffered security. The fraudulent misrepresentation is the basis of the estoppel claimed.

We go no further than the question directly presented. We hold that where as here the mortgagor, a married man, procures a loan on his homestead by fraudulently representing that he is unmarried, and afterwards his wife dies, ownership remaining in the meantime unchanged, the situation then being that a mortgage executed by himself alone is valid, he will not be heard to say in a court of equity that the mortgage

which he made when his wife was living was void and will be held estopped to assert its invalidity.

Instructive cases from other jurisdictions are Pitman v. Mann, 71 Neb. 257, 98 N. W. 821; Adams v. Gilbert, 67 Kan. 273, 72 Pac. 769, 100 Am. St. 456; Mason v. Dierks Lumber & Coal Co. 94 Ark. 107, 125 S. W. 656, 26 L.R.A.(N.S.) 574.

Order affirmed.

FRANK PARAS v. CHICAGO GREAT WESTERN RAILROAD COMPANY.[1]

November 4, 1921.

No. 22,459.

Derailment of track motor car — finding of negligence sustained.

1. Plaintiff was injured when a track motor car on which he was riding was derailed. The evidence sustains a finding that the operator of the car was negligent and that plaintiff was free from contributory negligence.

Cook in search of supplies within his line of duty.

2. Plaintiff was a cook hired and paid by defendant to cook and obtain supplies for a crew of track men. The men paid the cost of the supplies obtained. *Held*, that the evidence sustains a finding that plaintiff was in the course of his employment while going to a nearby town for the purpose of procuring necessary supplies, and that the use of the motor car to transport him was an authorized use.

Action in the district court for Ramsey county to recover $5,000 for injuries received while in the employ of defendant. The answer specifically denied that plaintiff was injured while engaged in interstate commerce and denied that at the time he was performing any service for defendant. The case was tried before Haupt, J., who at the close of the testimony denied defendant's motion for a directed verdict on the ground that no cause of action had been shown, and a jury which

[1]Reported in 184 N. W. 971.

returned a verdict for $750. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Briggs, Weyl & Briggs, for appellant.

Barton & Kinkead, for respondent.

HALLAM, J.

1. Plaintiff was in the employ of defendant as laborer, and was assigned to a crew doing track work along the line of defendant's road. There were about 60 men in the crew in charge of a foreman. The company assigned to them 10 bunk cars in which they lived and slept and two cook cars in which their meals were prepared. The custom was for the foreman to select cooks from among the men, and, if none of them were qualified to cook, he might hire "another cook from the town." The cook was paid by the defendant the same wages as the other men, and it was his duty not only to cook for the men, but to buy the supplies. The company did not furnish either supplies, dishes or utensils. To cover the cost of these each man contributed his share. The custom was to purchase some supplies in Saint Paul, but it was necessary to purchase part of what was needed at towns along the way. In January, 1920, the crew was located at Eden, Minnesota, a small town on defendant's road. They wanted supplies which were not procurable there and the nearest town at which they might be procured was Dodge Center, eight miles away. The foreman picked out three men from the gang and plaintiff, who was one of the cooks, and together with these men started for Dodge Center on a motor car. This motor car was similar to a hand-car, except that it was operated by power. It belonged to the company and had been furnished some time before and the foreman and men were accustomed to use it for the purpose of procuring supplies when needed. The car was operated part of the way by the foreman and part of the way by one of the men under his authority. During the progress of the trip the car ran into an open switch and plaintiff was injured. There was a semaphore which indicated that the switch was open but the operator of the car paid no at-

tention to the semaphore. This action was brought to recover damages. Plaintiff had a verdict and defendant appeals.

The operator of the car was an employe of defendant and he was guilty of negligence in the operation of the car. As to these propositions there is no room for doubt.

Plaintiff was riding on the front seat of the car and it is argued that he was guilty of contributory negligence. Had the jury so found such a finding would have been sustained, but we are of the opinion that his contributory negligence was not established as a matter of law.

2. The principal question in the case is whether defendant is answerable for the negligence of the operator of the car.

Defendant contends that these men were not in the course of their employment, but were on an errand personal to themselves and that therefore defendant is not answerable. The jury found against defendant on this proposition, and in our opinion their finding is sustained by the evidence. Plaintiff was within the course of his employment. He was procuring supplies, a duty which was imposed upon him by the defendant and for which he was paid by the defendant. The fact that the men contributed to the cost of the supplies is not inconsistent with the fact that the relation of employer and employe subsisted between plaintiff and defendant. Philadelphia, B. & W. R. Co. v. Smith, 132 Md. 345, 103 Atl. 945, 10 A.L.R. 1175; Philadelphia, B. & W. R. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. ed. 869.

Defendant further contends that the use of the motor car for the purpose of procuring supplies was unauthorized. It appears that the motor car was placed in the hands of the foreman without particular directions as to the purpose for which it should be used. He was never told not to use it for that purpose. He had habitually used it for that purpose, and, while the knowledge of this fact by his superior officers was not affirmatively shown, we think it may be implied from the extended use.

Judgment affirmed.

STATE v. WOMEN'S AND CHILDREN'S HOSPITAL ASSOCIATION.[1]

November 4, 1921.

No. 22,470.

Act valid.

1. Chapter 50, Law 1919 (Ex. Sess.) entitled "An act defining and regulating maternity hospitals," is not unconstitutional as embracing more than one subject within article 4, § 27, of the Constitution.

Constitution — exercise of police power — taking private property.

2. The statute was enacted in the exercise of the police power, and infringes no right of the defendant under article 1, § 7, of the Constitution, relative to the taking of property without due process, or other constitutional right.

Defendant was charged with the offense of maintaining a maternity hospital without first obtaining a license so to do, tried in the municipal court of St. Paul before Finehout, J., and found guilty as charged. From an order denying its motion for a new trial, defendant appealed. Affirmed.

C. D. O'Brien and *Charles L. Hayes,* for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham,* Assistant Attorney General, *Arthur E. Nelson,* Corporation Attorney, and *L. L. Anderson,* Prosecuting Attorney, for respondent.

DIBELL, J.

The defendant was convicted in the municipal court of St. Paul of maintaining a maternity hospital without first having obtained a license, and appeals.

Two questions are raised: (1) Whether chapter 50, p. 76, Laws 1919 (Ex. Sess.) is unconstitutional because it embraces more than one subject; (2) whether it is unconstitutional within article 1, § 7, of the Constitution guaranteeing due process.

[1]Reported in 184 N. W. 1022.

1. The statute is entitled "An act defining and regulating maternity hospitals." The Constitution provides that "no law shall embrace more than one subject, which shall be expressed in its title." Article 4, § 27.

The statute defines a maternity hospital, for the purposes of the act, and provides for its licensing by the state board of control. Conducting such a hospital without a license is a misdemeanor. Regulations are prescribed for its conduct, and for the health and well-being of the inmates, and public welfare is in view. The purpose of the constitutional provision is to prevent a fraud upon the public and the legislature by the passage of acts, the nature of which is not disclosed in their titles, and to prevent the passage of unrelated measures by a combination of interests concerned with only a part of them and regardless of the others, so that each does not receive separate legislative consideration on its merits. State v. Erickson, 125 Minn. 238, 146 N. W. 364; State v. Shevlin-Carpenter Co. 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765; 3 Dunnell, Minn. Dig. §§ 8906-8920, and cases cited. We are unable to see that the act under consideration contains anything which is not germane to the title. Within the constitutional sense it embraces but one subject.

2. The statute is a police regulation. Its purpose is to secure the health and comfort and well-being of the inmates of the hospital and to safeguard the interests of the public. That in doing so it somewhat restricts the activities of those conducting maternity hospitals, if the restriction be no greater than is reasonable, is not important. Others than the owners are interested. The legislature may require physicians to be licensed. State v. State M. E. Board, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; State v. State Board of M. E. 34 Minn. 387, 26 N. W. 123. It may require the licensing of rendering plants. Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869, 1095. Many callings having to do with public health or welfare may be regulated. 1 Dunnell, Minn. Dig. § 1603. That the legislature may require the licensing of maternity hospitals has been held. People v. Hagan, 52 App. Div. 387, 65 N. Y. Supp. 120, affirmed without an opinion in 165 N. Y. 607, 58 N. E. 1091; Adleman v. Board of Health, 84 Conn. 691, 81

Atl. 1055. Whether the licensing of maternity hospitals should be regulated, as it is by the statute drawn in question, was a matter of legislative discretion, and the statute invades no constitutional right of the defendant under article 1, § 7, of the Constitution, or other constitutional right.

We do not agree with counsel for the defendant that the statute grants to the board of control arbitrary power to withhold a license, regardless of conditions, and that it is therefore void within Noble v. Douglas, 274 Fed. 672, and other cases cited in his brief. The statute is paternalistic. So are other statutes enacted in the exercise of the police power. It contemplates an investigation and consideration of conditions and a supervision and regulation by the board, but an arbitrary refusal of a license is not intended.

The only questions decided are that the title of the act is sufficient within the constitutional requirement, and that in the exercise of the police power the legislature may require maternity hospitals to be licensed.

Order affirmed.

STATE v. ETHEL WORMACK.[1]

November 4, 1921.

No. 22,476.

Homicide — charge to jury — conviction sustained by evidence.

1. The evidence justified an instruction submitting murder in the first degree to the jury, and the record warrants a conviction of murder in that degree.

Assignment of error unfounded.

2. Nothing in the trial furnishes a basis for an assignment of error on the ground of race prejudice.

Defendant was indicted by the grand jury of Ramsey county charged with murder in the first degree, tried in the district court for that

[1]Reported in 184 N. W. 970.

county before Brill, J., and a jury, and found guilty as charged in the indictment. From the judgment sentencing her to confinement at hard labor in the state reformatory for women at Shakopee for the term of her natural life, defendant appealed. Affirmed.

J. Louis Ervin, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham,* Assistant Attorney General, *Richard D. O'Brien,* County Attorney, and *Christopher D. O'Brien, Jr.,* Assistant County Attorney, for respondent.

HOLT, J.

Defendant was convicted of murder in the first degree, and sentenced accordingly. She appeals.

There was no motion for a new trial, and in the trial no exception to any ruling or instruction of the court was taken. Hence the appeal narrows down to the proposition whether the evidence sustains the verdict of first degree murder. If it does, the court was also right in instructing the jury as to the elements constituting that degree of crime.

The circumstances attending the killing of Edna Kelsey, as shown by the state's witnesses were these: On the morning of September 20, 1920, defendant and her husband were in attendance at the municipal court in St. Paul. Edna Kelsey and one Barnett, with whom Edna was then cohabiting, were also in court. Defendant invited Edna and Mr. Barnett to her home, situate in an alley in State street, West St. Paul. The party arrived there shortly after 11 o'clock in the forenoon and spent some time in playing cards. At about 1:30 Barnett left. One Clarence Johnson, who stayed at another house in the alley, joined the party. Defendant's husband procured lemon extract and root beer for the guests. The stuff was potent, for both Johnson and Edna became somewhat drunk. Shortly before 4 o'clock Edna and defendant's husband had a boisterous quarrel that attracted the attention of the neighbors in the alley. Edna was seen and heard coming away from defendant's home. She entered one of the neighboring houses in the alley. But after a few minutes stay she returned towards defendant's house, and renewed the dispute with defendant. One witness says she dared defendant to come out and fight with her. According to the testimony

of the state's witnesses, she did not attempt to enter defendant's home, but stood a few feet outside the screen door. As she so stood, defendant approached this door from the inside, pushed it open with one hand, and fired a revolver three times at Edna, who started off toward State street, but fell as she reached the street. One bullet passed through Edna's lower jaw, lodged near the spinal column, and caused death within a few hours. It also appears that one bullet passed through defendant's hand. Directly after the shooting defendant stated to one of the witnesses: "I shot her, but I shot myself like a damn fool," and that a few moments thereafter she walked over to where Edna was lying on the ground, caught hold of and pulled at her clothes, saying: "Get up, bully." The state's case leaves it clear that no assault was made upon defendant by Edna. The nearest to it was the invitation to come out and fight. She made no move to open the screen door, and was standing several feet from it, when defendant began to shoot from the inside.

The question is whether there was room for finding a premeditated design to effect death. The jury could find from the evidence recited an intentional killing, and this justifies a verdict of guilty of murder in the first degree. State v. Lentz, 45 Minn. 177, 47 N. W. 720. As said in State v. Brown, 41 Minn, 319, 323, 43 N. W. 69, of first degree murder: "The offense may be found to be of this grade from the mere fact and circumstances of the killing; and where there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was intentional and malicious, and was prompted and determined on by the ordinary and natural operations of the mind. State v. Lautenschlager, 22 Minn. 514, 526. The law will not, therefore, attempt to lay down a more specific rule. It cannot define the length of time within which the determination to murder or commit the unlawful act resulting in death must be formed." The evidence justified the verdict and judgment rendered.

There is an attempt to assign error on the ground that the prosecuting attorney raised the race issue. It appears that Edna Kelsey was a colored woman, as were also all the persons at the party and the eyewitnesses of what occurred in connection with the shooting, except de-

fendant. For some reason, not apparent to us, the prosecuting attorney asked several witnesses whether defendant was generally considered white or colored. No exception was taken to the inquiry by the very able attorney who represented defendant in the trial. And we fail to see any prejudice to defendant, even if an exception had been saved. The trial was undoubtedly had in a well lighted court-room, where the jury could very readily determine whether the complexion of defendant was such that she could be considered of the white race. The husband of defendant was one of the party; he was seen at the house a few minutes prior to the shooting; he was there immediately after. It cannot be considered as prejudicial that, he being present at the trial, the prosecuting attorney requested him to stand up so that he could be identified by a witness as one of the persons present during the afternoon of the murder. No objection whatever to his doing so was made.

Had defendant's account of the occurrence been accepted by the jury, the verdict should have been not guilty, as the learned trial court specifically instructed, but, evidently, the testimony of the state's witnesses, neighbors and acquaintances of defendant, impressed the jury as being the truthful and reliable version of the circumstances under which Edna Kelsey met her death at the hands of defendant.

The judgment must be and it is affirmed.

FRANK E. NEMEC v. EARLE BROWN AND NATIONAL SURETY COMPANY.[1]

November 4, 1921.

No. 22,487.

Sheriff not liable for premature delivery of extradited prisoner.

1. The fact that, pending an appeal in habeas corpus proceedings, a sheriff, in violation of the statute, prematurely delivered a prisoner, whom he lawfully held in custody under an extradition warrant, to the agent of the demanding state named in such warrant, and failed to

[1]Reported in 184 N. W. 956.

accompany him to the state line as provided by the statute, does not of itself create a cause of action for damages where the wrongful act of the sheriff is not the proximate cause of the alleged damages.

When sheriff is liable only to statutory punishment for violation of duty.

2. Where the legislature prohibits or requires the doing of an act by a sheriff and prescribes a punishment for a violation of its mandate, the punishment furnishes the exclusive remedy for the wrong and the act cannot be made the basis of an action for damages, unless the aggrieved party has been specially injured thereby in his person or property.

Action in the district court for Hennepin county to recover $200,000 upon defendant sheriff's bond. From an order, Molyneaux, J., sustaining the separate demurrers of defendants to the complaint, plaintiff appealed. Affirmed.

H. K. Chance, for appellant.

Floyd B. Olson and *Lancaster, Simpson, Junell & Dorsey,* for respondents.

QUINN, J.

This action was brought to recover damages from the sheriff of Hennepin county and his bondsmen, for an alleged delinquency of the sheriff in the performance of his official duties. From an order of the district court sustaining defendants' demurrers to the complaint, plaintiff appealed.

Plaintiff was arrested by the sheriff under an extradition warrant issued by the Governor of Minnesota upon the requisition of the Governor of Illinois. After arrest plaintiff obtained a writ of habeas corpus from the district court. Upon hearing, the writ was quashed and plaintiff remanded to the custody of the sheriff. On the same day plaintiff appealed to the supreme court from the order quashing the writ, and served notice of such appeal upon the sheriff and county attorney. Before a hearing on the appeal was had the sheriff turned plaintiff over to the agent of the state of Illinois and he was taken to that state where he was tried and acquitted on the requisition charge. But the habeas corpus appeal was without merit, and this court ordered plaintiff remanded to the custody of the agent. Plaintiff therefore was bound to

go to Illinois on the warrant of extradition, and he suffered no injury by the premature action of defendant in surrendering custody to the Illinois agent.

This action is brought to recover exemplary damages for the delinquency of the sheriff in turning plaintiff over to the Illinois agent while such appeal was pending, and for his failure to accompany plaintiff to the state line before turning him over to the Illinois agent. The action is based upon the provisions of G. S. 1913, §§ 9038-9043. Section 9038, after providing for an investigation by the attorney general or county attorney of the ground of a demand for a fugitive and the issuance by the Governor of his warrant authorizing a sheriff to take the person to the state line and there deliver him to the agent of the state making the demand, provides that:

"Upon receipt of such warrant, such officer may arrest and retain in his custody the person whose surrender is demanded; but no person arrested on such warrant shall be delivered to the agent designated therein, or to any other person, until he shall have been notified of the demand for his surrender, and of the nature of the criminal charge made against him, nor until he has had an opportunity to apply for a writ of habeas corpus, if he shall claim such right of the officer making the arrest. Whenever such writ shall be applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the attorney general or the county attorney of the county in which the arrest is made. Every sheriff or other officer making such arrest, who shall deliver over to the agent named in such warrant, or to any other person for extradition, the person so in his custody under such warrant, without having complied with the provisions of this subdivision, shall be punished by imprisonment in the county pail for not more than six months, or by a fine of not more than one thousand dollars, or by both."

The statute creates no substantive rights in persons arrested on extradition warrants, nor does it give to such persons a civil right of action for its breach. There can be no recovery, unless special injury or damage to plaintiff resulted from the sheriff's illegal acts, that is, the delivery of plaintiff to the agent pending the appeal and his failure to accompany plaintiff to the state line. The rule applicable is clearly

stated in 1 C. J. 985-989. See also Rex v. Robinson, 2 Burr. 799; City of Faribault v. Misener, 20 Minn. 347 (396); Ward v. Severance, 7 Cal. 126; Mairs v. Ry. Co. 175 N. Y. 409, 67 N. E. 126. The same principle is recognized in Mix v. Board of Comrs. Nez Perce County, 18 Idaho, 695, 112 Pac. 215, 32 L.R.A.(N.S.) 534; Ware-Kramer Tobacco Co. v. American Tobacco Co. 180 Fed. 160; Mack v. Wright, 180 Pac. 472, 36 Atl. 913; McKinney v. Monongahela Nav. Co. 14 Pa. St. 65, 53 Am. Dec. 517.

The rule is based upon a correct theory. The turning over of a prisoner lawfully held to one not lawfully entitled to hold him, is, in effect, discharging such prisoner. Our statute makes it a crime to assist in the escape, or to receive a gratuity for assisting in the escape, of a prisoner. The mere defining of this breach of duty and the provision for punishment therefor, does not create a private cause of action for damages. In such case it will not be presumed that the legislature, by prohibiting the act, intended to establish a substantive duty, the violation of which would create a private right of action for damages. The statute contains many similar provisions for the procedure of officers in criminal matters, the violation of which could not afford bases for private actions. Whether a liability arises from a breach of the duty of an officer in such matters, must depend upon whether an individual right, existing under substantive law, has been violated.

In his complaint plaintiff alleges: "That because of the * * * acts of defendant sheriff plaintiff was caused great pain, anguish, and physical and mental suffering, and was branded and advertised as a common criminal, falsely, and suffered great agony of mind thereby," to his damage in the sum of two hundred thousand dollars ($200,000.00), for which amount he asks judgment. The mere fact that plaintiff was transferred from the custody of the sheriff to that of the agent, while being detained in Minnesota, could not cause the pain and mental suffering, nor the disgrace complained of. It appears from the face of the complaint that the alleged branding of the plaintiff as a common criminal was because of the indictment against him on insufficient facts, taken in connection with his arrest under the extradition warrant, and not because of his premature delivery by the sheriff to

the Illinois agent, nor the failure of the sheriff to accompany him to the state line. In order to sustain a civil action against a sheriff in such a proceeding, it must appear that the complaining party has sustained injury through some act or default of the officer. Liljengren v. Ege, 46 Minn. 488, 49 N. W. 250; 35 Cyc. 1785; Larson v. Chase, 47 Minn. 307-311, 50 N. W. 238, 14 L.R.A. 85, 28 Am. St. 370; Beaulieu v. Great Northern Ry. Co. 103 Minn. 47, 114 N. W. 353, 19 L.R.A. (N.S.) 564, 14 Ann. Cas. 462; Lesch v. Great Northern Ry. Co. 97 Minn. 503, 106 N. W. 955, 7 L.R.A.(N.S.) 93; 17 Corpus Juris, 831. We think the demurrers were properly sustained. There is no merit in the discussion of the holding in the case of State ex rel. Nemec v. Sheriff of Hennepin County, 148 Minn. 484, 181 N. W. 640.

Affirmed.

F. J. ALBRECHT v. IGNATZ RATHAI AND ANOTHER.[1]

November 4, 1921.

No. 22,492.

Purchaser of note procured by fraud of payee not a good faith holder.

1. A good faith purchaser of a note procured by the payee by fraud of the character defined in G. S. 1913, § 6015, is not protected as a bona fide holder, but, to make a defense within the statute, it must be shown that the maker's signature was obtained by fraudulent representations as to the nature and terms of the contract signed, that he did not believe it to be a negotiable instrument, and that he was not guilty of negligence in signing.

Existence of facts essential to a defense, question for the jury.

2. The evidence made a question for the jury whether the facts essential to a defense under the statute existed, and it was error to direct a verdict for the plaintiff.

Error to direct verdict when evidence of fraud of payee and no evidence of buyer's good faith.

3. If a note is procured by the payee by fraudulent representations

[1]Reported in 185 N. W. 259.

as to its contents, and other elements essential under the statute to constitute a defense do not exist, a good faith purchaser is protected, but fraud being shown, the burden is upon the purchaser to prove that he acquired title bona fide, and, under the evidence in this case, there being evidence of fraud and no evidence of the purchaser's good faith, a verdict should not have been directed for the plaintiff.

Neither waiver nor ratification shown.

4. The evidence does not show as a matter of law that the defendants waived the fraud or ratified the notes.

Where broker was guilty of fraud in getting notes, buyer has burden of proving good faith.

5. If the payee, the broker of the defendants in selling their farm, produced as a purchaser a person who did not complete the contract, the payee intending that he would not, but using him to get commission notes from the defendants, he was guilty of fraud, and his title to the notes was defective within the negotiable instruments act, and a purchaser would have the burden of proof of good faith.

When evidence of other similar frauds may be competent.

6. Evidence of other fraudulent acts, similar in character, committed about the same time, is competent to show intent and design in the particular act, and such frauds may be of such character as to show a series of fraudulent doings through which a common purpose runs, a general scheme to defraud broad enough to include that charged and of which it is a part, so as to make them competent as substantive proof of it. Whether the evidence received was sufficient in view of the facts stated in the opinion, is not decided.

Action in the district court for Faribault county to recover $1,800 on a promissory note. The defense is given in the third paragraph of the opinion. The case was tried before Dean, J., who at the close of the testimony granted plaintiff's motion for a directed verdict for the amount demanded and interest. From an order denying their motion for a new trial, defendants appealed. Reversed.

Frundt & Morse and *C. J. Laurisch,* for appellants.

Charles E. Conant, for respondent.

DIBELL, J.

Action on a promissory note for $1,800. A verdict was directed for

the plaintiff. The defendants appeal from the order denying their motion for a new trial.

On August 2, 1919, the defendants, Ignatz Rathai and Elizabeth Rathai, husband and wife, contracted to sell to one Clark their farm of 240 acres at $165 per acre, or $39,600. Of this amount $1,000 was paid in cash, $9,000 was to be paid on March 1, 1920, and the balance in seven years from that date. One Brecht was the agent of the defendants in procuring Clark as a purchaser and was to have as his commission all above $150 per acre for which he could sell the land, or, as the sale turned out, $3,600. Two notes of $1,800 each were given by the defendants to Brecht, due on March 1, 1920, one of which was indorsed to the plaintiff and is the note in suit.

The defendants claim that the notes were procured from them by fraudulent representations as to the nature of the contract, that they did not believe that they were signing promissory notes, and that they were not negligent in signing as they did. They claim, further, that Brecht fraudulently made use of Clark, as vendee, to get the commission notes, with no intention that the sale would be completed. The evidence as to this defense was stricken. The plaintiff offered no evidence in rebuttal. He claims that no case of fraud, within or apart from the statute, was made, and, further, that the defendants waived the fraud or ratified the notes.

1. By G. S. 1913, § 6015, it is provided:

"No person, nor the heirs or personal representatives of any person, whose signature is obtained to any bill of exchange, promissory note, or other paper negotiable under the law merchant, shall be held liable thereon if it be made to appear that the signature was obtained by fraudulent representation, trick, or artifice as to the nature and terms of the contract so signed, that at the time of signing he did not believe it to be a bill of exchange, promissory note, or other paper negotiable under the law merchant, and that he was not guilty of negligence in signing such paper without knowledge of its terms. The question of negligence in any suit on such contract shall in all cases be one of fact for the jury, and the person sought to be charged thereon shall be entitled to have the question of his negligence submitted to a jury."

This section was not repealed by the Uniform Negotiable Instruments Act. G. S. 1913, § 6007.

The purchaser in good faith of a note executed under the conditions defined by the statute, is not protected as a bona fide purchaser, but takes subject to the defense. Farris v. Koplan, 113 Minn. 397, 129 N. W. 770; Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769; National Farmers Bank v. Nygren, 141 Minn. 49, 169 N. W. 228.

To make a defense within the statute, the signature must be obtained by a fraudulent representation as to the nature and terms of the contract signed, the signer must not believe it to be a negotiable instrument, and he must not be guilty of negligence in signing. This much but no more is required, and the good faith of the purchaser does not avail him.

2. Both defendants were born in Poland. Ignatz was 73 years of age at the time of the transaction, and had lived in this country 45 years. He and his wife spoke German. Neither could read nor write English. He spoke and understood English so as to get along in his business matters. She was less proficient. Brecht spoke German. The negotiations between him and the defendants were in German. Both Ignatz and his wife say that they did not know that they were signing a promissory note; that nothing was said about a note; that Brecht told them to sign the papers, and that they thought they were signing papers which constituted the contract of sale and nothing more. Mrs. Rathai wanted to delay until their son, who was somewhere about town, came. Brecht refused, saying that he had to make a train. The papers were hurriedly signed. It can be inferred that Brecht knew that the defendants were ignorant of English. He was acquainted with them. He was their agent and owed them active good faith. The evidence had a tendency to sustain the defendants' claim of fraud, want of belief that they signed a promissory note, and absence of negligence in signing. There was no evidence in rebuttal of it. A verdict should not have been directed for the plaintiff upon the issues made material by the statute.

3. The statute does not change the rule that knowledge in the purchaser of fraud in the payee in securing the execution of a note defeats

a recovery. Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940. It makes a new defense, in certain cases, against a purchaser. Before the Negotiable Instruments Act, fraud being shown, the purchaser had the burden of proving himself an innocent holder. 1 Dunnell, Minn. Dig. § 1040. The same rule prevails under the act. When the payee's title is defective, as that word is used in the act, because of fraud, as provided in G. S. 1913, § 5867, a purchaser seeking a recovery must take the burden of proof of good faith. First Nat. Bank v. Denfeld, 143 Minn. 281, 173 N. W. 661; G. S. 1913, § 5871.

There was evidence of fraud, and, though the defendants were found negligent, so that the statute was not a defense, still, if the jury found fraud, the burden was on the plaintiff to prove that he was an innocent purchaser, and he offered no evidence. A verdict should not have been directed for the plaintiff, though an element essential to a defense against an innocent purchaser under G. S. 1913, § 6015, was wanting.

4. The plaintiff claims that the defendants waived the fraud and ratified the notes. Clark sued to recover the $1,000 paid upon the ground that the title was defective. This suit was dismissed on the merits on December 4, 1919. On the same date the defendants acknowledged a second contract, dated August 1, 1919, the same date as the first one, and acknowledged by the plaintiff on August 7, 1919, embodying the general terms of the first, but supplying certain omissions. At the time the defendants acknowledged, that is, August 7, 1919, they had information that a note or notes were outstanding. The plaintiff claims that the execution of the new contract constituted a waiver of the fraud or a ratification of the notes as a matter of law. We do not think so. The contract was between Clark and the defendants. Brecht did not participate in it. Neither contract said anything about notes. Clark was not concerned with the notes. The fraud did not concern the contract of sale with Clark, but the notes to Brecht. The defendants, though fraud had been practiced upon them by Brecht in securing the notes, might wish to have the contract with Clark carried out, for, if $9,000 was paid on March 10, 1920, when the two notes became due, they could pay Brecht's commission and avoid trouble. Under such circumstances it cannot be said that there was a waiver

or ratification as a matter of law, if indeed it could be rightly found as a fact. See First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952.

5. The defendants claim that Brecht did not intend that the contract with Clark would be completed, but through the device of a sale to Clark fraudulently contrived to get and make use of their notes which were greatly in excess of the cash payment made. Brecht owed his principals good faith, and could not excuse the production of Clark as a purchaser, if he did not intend completing the contract. See Butler v. Baker, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. 897; Little v. Herzinger, 34 Utah, 337, 97 Pac. 639; Burnham v. Upton, 174 Mass. 408, 54 N. E. 873. If Brecht did not intend that Clark would carry out the contract, and made use of him and the contract merely to get the commission notes, he was guilty of fraud. He could not recover upon them. His title was defective within the wording of the Negotiable Instruments Act, and a purchaser would have the burden of showing good faith.

6. In support of their claim of fraud in this respect, the defendants offered testimony tending to show that Brecht, about the time of his transaction with them, got contracts from two other farmers in the vicinity for a sale of their farms to Clark. He paid, in behalf of Clark, $50 to each of them and was to pay an additional $1,000, or enough to make $1,000, in 30 days. He got from each a note of $1,600 for commission. In each case he was to have as his commission the excess over a net price. The deals were to be closed in March, 1920. Nothing was done toward carrying out the contracts. The evidence as to these two contracts was stricken.

The fact that Clark failed to carry out his contract was not alone evidence of Brecht's fraud as claimed. There was no evidence as to who Clark was, or of his calling, or of his financial standing, except that the local banker made inquiry by writing and did not get "a very definite answer." That received referred to his standing "a year or so back," and it was to the effect that "he was not very heavy." The evidence was itself incompetent and would not have been received over objection.

Evidence as to other fraudulent acts, similar in character and of

about the same time, is not received merely to show that the party charged has at other times practiced fraud, of one kind or another, or because his bad character in that respect is independent proof that he committed the fraud alleged against him. If admissible it is because it has some tendency to support proof of the main fact, by showing intent or design to defraud, or the other similar frauds shown may be of such a character as to show a series of connected fraudulent doings, a general scheme to defraud, broad enough to include that under consideration, and of which it is a part, so as to make them competent as substantive proof of it. Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940; Ryan v. Dowell, 86 Wash. 76, 149 Pac. 343; Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, 1 L.R.A.(N.S.) 1075, 107 Am. St. 823; McCauley v. Custer, 93 Kan. 27, 143 Pac. 489; People's Bank v. Reid, 86 Kan. 245, 120 Pac. 339; First Nat. Bank v. Harvey, 29 S. D. 284, 137 N. W. 365; First Nat. Bank v. Barker, 75 W. Va. 244, 83 S. E. 898; Beard v. Hill, 131 Mich. 246, 90 N. W. 1065; White v. Beal & Fletcher Grocer Co. 65 Ark. 278, 45 S. W. 1060; Wheeler v. Ahlers, 189 Pa. St. 138, 42 Atl. 40; First Nat. Bank v. Wise, 172 Iowa, 24, 151 N. W. 495; 1 Wigmore, Ev. §§ 301-304, 321, 333, 334; 1 Jones, Ev. § 142; 1st & 2nd Dec. Dig. Evid. § 135 (1, 2). The same rule has been applied in criminal cases. State v. Monroe, 142 Minn. 394, 172 N. W. 313; State v. Ettenberg, 145 Minn. 39, 176 N. W. 171; State v. Friedman, 146 Minn. 373, 178 N. W. 895, 184 N. W. 272.

Whether the evidence of similar transactions was sufficient to go to the jury, so as to make it error to strike it out, we do not decide, for there must be a new trial upon the other grounds mentioned. We have remarked upon the meagerness of the evidence as to Clark's condition and his connection with the transaction. In view of a new trial it is not out of place to say that, if there was the particular fraud claimed, there is likely available evidence showing something about Clark and his relation to Brecht and to the contracts of sale, which will make it easy to determine the admissibility of evidence of similar transactions and its sufficiency to put the issue to the jury.

The case does not present the question of the right of a broker against

his principal when he is to receive the excess over a net price and the sale is not completed, there being no fraud, or what conduct of the broker forfeits his right to an agreed commission. Martinson v. Hensler, 132 Minn. 437, 157 N. W. 714, 991; Meyer v. Keating Land & M. Co. 126 Minn. 409, 148 N. W. 452.

Plaintiff's evidence, if he chooses to offer any on a new trial, may show that the defendants knew that they were signing notes, and that there was no fraud under the statute cited, nor independently of it, but unexplained there was evidence making for the contention of the defendants which the direction of a verdict ignored.

Order reversed.

AUGUST J. MARTINSON, AS FATHER OF AERIENNE MARTINSON, A MINOR CHILD, AND AUGUST J. MARTINSON v. REINHOLD F. NEUBERT AND OTHERS.[1]

November 10, 1921.

Nos. 22,378, 22,379.

Negligence of landlord question for jury — poison left in kitchen.

1. There is evidence that the agent of a flat owner rented a flat to a family with small children and that the owner assumed the obligation of preparing the premises for occupancy. A glass containing poison somewhat resembling water had been left by workmen on the drain board of a kitchen sink, and it remained there when the tenant moved in. Soon after the family entered the premises, one of the children, 18 months old, drank some of the poison from this glass. The question of the owner's negligence was one of fact for the jury.

Judgment non obstante — effect of joint motion.

2. Where two defendants, after verdict, jointly move for judgment, their cases must stand or fall together.

Two actions in the district court for Hennepin county, one by the father to recover $20,000 damages for injuries to his minor child, and

[1]Reported in 185 N. W. 651.

the other to recover $7,000 for medical treatment, loss of companionship and services of the child. The cases were tried together before Molyneaux, J., who when plaintiffs rested granted a motion to dismiss the action as to defendant Neubert and at the close of the testimony granted a similar motion in favor of defendant Hauessler, denied motions for directed verdicts in favor of the other defendants, and a jury which returned verdicts for $1,000 and $500 respectively. The motions of defendants June Purchase and Alfred W. Heald for judgment notwithstanding the verdict were granted. From the judgments entered pursuant to the orders for judgment, plaintiff appealed. Reversed.

Everett Moon, for appellant.

Roberts & Strong and *A. D. Smith,* for respondents.

HALLAM, J.

1. This is an action for damages predicated on the following facts: Defendant Purchase held title to a flat building in trust for defendant Heald. The property had recently been acquired. A commission arising in connection with its acquisition was still owing to defendant Hauessler and he was to receive the amount due him out of the rents. The testimony is in conflict as to the arrangement between the parties, but there is evidence that Heald was in control of the property, that Hauessler was his agent to rent the property and collect the rents, and to apply the rents, less his charges for collection, on the debt due him. Hauessler, in the name of Heald, rented one of the flats to plaintiff and agreed to have the flat ready next day. There is evidence that Heald notified the janitor that the flat was rented and gave directions to clean the place up. Some workmen had previously left standing, on the drain board of the kitchen sink, a drinking glass containing oxalic acid, and it remained there when the family moved in. The acid was liquid and clear, like water, only it was thick and crystallized on top.

Plaintiff had two children, one Aerienne, 18 months old, and another younger. Defendants were advised of this fact. Soon after plaintiff's family entered the flat to occupy it, Aerienne ran to the kitchen, took the glass and drank a portion of the contents and suffered severe injury. The inference may doubtless be drawn that the child thought she

was taking a drink of water. Plaintiff sued in his own behalf and as father of Aerienne. The jury found for plaintiff in both cases. The court directed judgment for defendants notwithstanding the verdict and plaintiff in each case appeals.

The action is predicated on negligence. We cannot see that the doctrine of the "turntable cases" or of the "attractive nuisance" cases has any application. Those cases have limited application to instrumentalities maintained by a landowner upon his land which are so attractive to children as to induce them to trespass and receive injury. The doctrine applicable here is broader. The question is whether defendants owed a duty to this child who they knew was about to come rightfully upon these premises, which was violated by leaving this glass of poison where it was in fact left. We are of the opinion that under the evidence the question of liability was properly one of fact for the jury.

Defendant assumed and owed to plaintiff and his family the duty of preparing the premises for occupancy, and that duty was broad enough to impose an obligation to leave no deleterious substance in such position as to likely cause injury to the family of the tenant coming upon the premises. We think the evidence sustains a finding that this duty was violated, and that it was negligence to leave a water colored poison in a drinking glass on the premises where children were rightfully about to enter, and at a place within a child's reach and where water might reasonably be expected to be found.

The principle which subjects an owner to liability arising from concealed dangers on his premises, Keegan v. Heileman Brewing Co. 129 Minn. 496, 152 N. W. 877, L.R.A. 1916F, 1149, is analogous. So is the doctrine that one who has in his possession or under his control an instrumentality exceptionally dangerous in character is bound to take commensurate precaution to prevent an injury being done thereby. 20 R. C. L. 51; Anderson v. Smith, 104 Minn. 40, 115 N. W. 743.

Harpel v. Fall, 63 Minn. 520, 65 N. W. 913, which had application only to the habitable condition of the premises, is not pertinent to a case like this. See Peterson v. Martin, 138 Minn. 195, 164 N. W. 813.

2. There may be doubt as to the liability of the defendant Purchase, but she saw fit to make her motion subsequent to the verdict jointly

with the defendant Heald and her case in this court must therefore stand or fall with his.

Judgments reversed with direction to enter judgment on the verdict.

STATE v. P. A. SUMMERLAND AND OTHERS.[1]

November 10, 1921.

No. 22,406.

Sale of investment securities without license — indictment demurrable.

1. Where an indictment alleges but one sale of investment securities without a license as a violation of chapter 429 of the Laws of 1917, as amended by chapter 105 of the Laws of 1919, it thereby brings the charge within the exception contained in the statute and is demurrable.

Sufficient facts must be pleaded to show defendants were dealers.

2. Where it appears from an indictment that defendants were not the issuers or owners of the securities alleged to have been sold, sufficient facts must be pleaded to show that they were dealers in such securities.

Units as defined in indictment, within terms of Blue Sky Law.

3. Units, as used and defined in the indictment, *held* to be within the term investment securities, as used in the statute. State v. The Gopher Tire & Rubber Co. 146 Minn. 52.

Defendants were indicted by the grand jury of Douglas county charged with the crime of selling securities without a license. Defendants' demurrers to the indictment were overruled, Nye, J., and the questions of law raised by the demurrers certified to the supreme court as important and doubtful. Reversed and remanded.

Gunderson & Leach and *Ralph S. Thornton,* for appellants.

Clifford L. Hilton, Attorney General, *Montreville J. Brown,* Assistant Attorney General, and *R. G. Anderson,* County Attorney, for respondent.

[1]Reported in 185 N. W. 255.

QUINN, J.

The grand jury of Douglas county returned an indictment against defendants jointly. When called to plead, Schaefer and Urness interposed separate demurrers which were overruled, and upon request the district court certified to this court for decision the question of law so raised. The question is whether the indictment is sufficiently specific to charge a violation of the provisions of chapter 429, p. 635 of the Laws of 1917, as amended by chapter 105, p. 99 of the Laws of 1919.

It is urged in support of the demurrers: (1) That the indictment charges but one sale, and thereby brings the act complained of within the exception contained in the statute; (2) that sufficient facts are not set forth to show that defendants were dealers, nor that the units claimed to have been sold constitute either an investment contract, stock, bond or other security, within the purview of the law.

The charging part of the indictment is as follows:

"The said P. A. Summerland, Henry A. Schaefer and Andrew A. Urness on the fourth day of July, A. D. 1920, at the city of Alexandria in the County of Douglas, being then and there dealers, did wrongfully, wilfully and unlawfully offer for sale and sell to one Andrew Haugen certain securities issued by The Alexandria Minnesota Oil Syndicate, of Alexandria, Minnesota, an unincorporated association, known and designated by said association as units, to-wit, three units, of the par value of one hundred dollars each, each of which said units entitles the owner thereof to an undivided beneficial interest in and to the property and assets of said association and in and to the profits resulting from the operation thereof (such unit being registered in the books of said association in the name of the owner thereof) to participate in the management and control of the business and affairs of said association by casting one vote at any meeting of the unit holders of said association upon any question coming before such meeting; said offer and sale so made as aforesaid being then and there made in the course of continued and successive transactions of a similar nature; the said The Alexandria Minnesota Oil Syndicate then and there being an investment company, the said P. A. Summerland, said Henry A. Schaefer, said Andrew A. Urness and the said The Alexandria Minnesota Oil

Syndicate, or any one of them, not being then and there licensed by the State Securities Commission of the State of Minnesota, to sell said securities within the State of Minnesota as required by law, contrary to the form of the statute in such case made and provided," etc.

The here material parts of the statute are: (A) Section 2 and subdivision (j) thereof which provides that the statute shall not apply to isolated or single transactions; (B) section 3, as amended, which, read in connection with section 4 in the first paragraph, prohibits an issuer of investment contracts from engaging in the business of selling or offering them for sale in the state unless licensed, and in the second paragraph prohibits any dealer from selling or offering for sale such securities, or professing the business of so selling or offering, within the state, unless the sale of such securities by the company or the dealer be licensed; (C) the closing paragraph of section 17 as amended.

In the second paragraph of section 3 of the original act (section 4 of the amendatory act), a dealer is defined to be any person, firm, copartnership, company, corporation or association, not the issuer, who shall, within the state, sell or offer for sale any of the stocks, bonds, investment contracts, or other securities, issued by an investment company; or who shall, by advertisement or otherwise, profess to engage in the business of selling or offering for sale such securities within the state. Then follows this language: "The term dealer shall not include an owner, not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust."

The closing paragraph of the original act (section 10 of the amendatory act) provides that in prosecutions under the act, any of the exceptions specified in sections 2, 3 and 6 shall constitute a matter of defense, and that it shall not be incumbent upon the state to allege or prove that the securities disposed of, or the acts complained of, do not come within any of such exceptions. It is urged on behalf of the prosecution that this latter provision makes it unnecessary to allege in the indictment the exceptions found in the definition of the term dealer in the second paragraph of section 3, i. e., that the defendants were not

issuers of the securities they sold, nor owners thereof, making the sale outside of a course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust. We find it unnecessary to decide whether the closing paragraph of section 17 as amended is sufficiently broad to exempt the pleader from alleging these negations, which seem to characterize the definition of dealer rather than to be a specification of securities sold or acts done. We content ourselves with saying that the language is not broad enough so that, where it appears on the face of the indictment that defendants were owners of the securities sold, it would be incumbent upon them as a matter of defense to establish that the sale was not made in the course of continued and successive transactions of a similar nature. If it appeared from the indictment that defendants were owners of what they sold, it would be necessary to allege and prove that the sale was made in the course of continued and successive transactions of a similar nature. If made without and not within such a course of business, the transaction would not be punishable. The express language of both this section and that of subdivision (j) evidences the legislative intent that no part of the statute shall apply to single or isolated transactions.

It is manifest that the pleader attempted to frame this indictment under the second paragraph of section 3, that is, against persons disposing of the thing offered for investment, rather than against the issuer thereof, for the "Oil Syndicate" was not indicted. It fairly appears from the whole indictment that the "Oil Syndicate" was an investment company issuing some sort of investment contracts within the meaning of the first paragraph of section 3. The so-called "units" are fairly within the definition of investment contracts as defined in State v. Gopher Tire & Rubber Co. 146 Minn. 52, 177 N. W. 937. This indictment then attempts to charge the defendants, as dealers, with disposing of the contracts issued by the "Oil Syndicate," when neither they nor the issuer were licensed so to do. It appears that defendants were not owners of the securities sold. This being the situation, sufficient facts should be set forth in the indictment to show that they were "dealers" within the meaning of the second paragraph of section 3. If

not chargeable as dealers they were not chargeable at all. Evidently the pleader considered the allegation, "said offer and sale so made as aforesaid being then and there made in the course of continued and successive transactions of a similar nature," sufficient to admit proof that defendants were dealers. Such an allegation might be sufficient for the purpose of bringing an owner into the class of dealers. It is not the meaning of the statute that a statement of such a conclusion may take the place of an allegation of facts sufficient to show that one not an owner or issuer is a dealer within the meaning of the second paragraph of section 3. If defendants were not owners, then the transactions could not have been of a similar nature in the sense used in the statute, for it is the element of ownership which gives them similarity. The pleading of such a conclusion is unavailing as a statement of facts, and leaves the indictment barren of any showing that defendants come within the definition of dealers. It is not alleged in what commodities they were dealers, and we hold that the alleging of a single transaction is not sufficient to show that they were dealers in investment securities within the meaning of the statute.

What has been said renders the indictment fatally defective in another particular. In State v. Gopher Tire & Rubber Co. supra, it was held that the offense of selling securities without a license is not committed where there is only a single or isolated sale, hence the indictment must go further in the way of alleging continuous acts or transactions. In our opinion this indictment does no more than to allege a single sale to Haugen. It cannot be held, as contended, that the prosecution may allege and prove a single sale and thereby shift the burden upon the defendant to establish as a defense that no other sales were made by them; the allegation and proof of a single or isolated transaction by one not a dealer in securities ipso facto remove the transaction from the operation of the statute. Further discussion is unnecessary.

The statement in the case of State v. Gopher Tire & Rubber Co. supra, that the indictment would not have been good had it stopped after charging a single sale must be qualified. As applied to a sale by an owner, not the issuer of the securities, the statement may be correct,

but not as to a sale made by a dealer in securities as defined by section 3, chapter 429, p. 637, Laws of 1917, as amended by section 4, chapter 105, p. 99, Laws of 1919.

The order overruling the demurrer is reversed and the cause remanded.

HALLAM, J. (dissenting).

I dissent. In my opinion the indictment is sufficient.

DIBELL, J. (dissenting).

I agree with Justice Hallam.

MOLLIE GILMAN v. ISRAEL C. GILMAN.[1]

November 10, 1921.

No. 22,409.

Limited divorce — finding sustained by evidence.

1. The evidence sustains the finding of the court that no ground exists for absolute divorce.

Separation should not be limited in time.

2. The decision of the court that there is ground for separation is sustained, but it is *held* that the separation should be without limit as to time.

Allowances revised.

3. Certain allowances for maintenance and attorney's fees readjusted and allowance made for attorney's fees and expenses on appeal.

Action in the district court for Blue Earth county for absolute divorce. The case was tried before Comstock, J., who made findings as mentioned in the first paragraph of the opinion. Plaintiff's motion for amended findings and conclusions. Plaintiff's motion to amend the decree and

[1]Reported in 185 N. W. 469.

judgment was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Modified.

S. B. Wilson, for appellant.

Ivan Bowen, for respondent.

HALLAM, J.

This is an action for divorce on the ground of cruel and inhuman treatment. Plaintiff is now 60 years old and defendant is 64. They were married 35 years ago and have three living sons, all grown men. The court found that plaintiff is not entitled to an absolute divorce, but gave judgment of separation from bed and board for the period of one year or until further order of the court. The judgment gave plaintiff $50 per month for support and maintenance. The court, on a preliminary motion, allowed $50 attorney's fees and $50 suit money and in the judgment declined to allow any further sum for attorney's fees. Plaintiff appeals.

1. Plaintiff contends that she is entitled to judgment for an absolute divorce and that the finding of the court to the contrary is not sustained by the evidence. The court found as a fact, in substance, that defendant was not guilty of such acts of personal violence as would constitute cruel and inhuman treatment within the meaning of the law, and also that defendant was not guilty of a systematic and long-continued course of ill-treatment, scolding, fault finding, unkind language and other acts of a malicious nature sufficient to justify the breaking of the bonds of matrimony. These findings of fact, plaintiff contends, are not sustained by the evidence. The record is voluminous and the testimony is in conflict. Plaintiff, her sister, and two sons of the parties, testified to acts of cruel and inhuman treatment, amply sufficient to justify a judgment of absolute divorce. This testimony is denied by the defendant, and there is some little corroboration to his testimony. It is fair to say that the testimony shows some measure of blame on each side. The testimony is of such character that we are of the opinion that the findings of the trial court above referred to should not be disturbed.

2. As above stated the court adjudged a separation from bed and

board for the period of one year. A separation of any sort, in view of the finding of the court above referred to may seem illogical, but on examination of the whole of the findings we think it may be sustained. In fact this portion of the judgment is not attacked by the defendant. We are of the opinion, however, after examination of the whole record, that any separation adjudged should be a separation from bed and board, without fixed limitation as to time. It seems to us highly important that these parties should be relieved from the strain and expense of litigation, and we are impressed with the belief that reconciliation is quite as probable under a decree of unlimited, as under a decree of temporary, separation.

3. Defendant is a man of large property, but is somewhat involved in debt. We are of the opinion that the allowance made for maintenance was inadequate under the circumstances of the parties, and that the allowance should be increased to $100 per month from the date of the first payment after filing this decision, with the right of either party to apply for a modification as to amount at any time after the expiration of one year from such date, if the parties shall at that time be living apart.

Plaintiff takes exception to the failure of the court below to give judgment for attorney's fees, and also makes application for the allowance of attorney's fees and expense money in connection with the appeal.

We are of the opinion that plaintiff should have been allowed $300 for attorney's fees by the trial court, from which should be deducted the $50 already paid.

An allowance is made of $200 for attorney's fees in connection with the appeal and $400.40 for necessary expense shown in connection with the appeal.

The judgment of the trial court will be modified in accordance with this opinion, and judgment will be entered in this court for the allowance here made. No other costs will be allowed.

Judgment modified.

B. F. YEATES AND ANOTHER, DOING BUSINESS AS YEATES & SON v. MARGARET A. YOUNG.[1]

November 10, 1921.

No. 22,486.

Municipal court had jurisdiction.

1. The complaint was for a money recovery well within the amount for which the municipal court may give judgment, and the answer did not plead a defense requiring the interposition of a court of equity before being available as such in a court of law, hence the court had jurisdiction to determine all the issues in the case.

Appeal and error — reversal of judgment for defect in record.

2. A judgment will not be reversed for the failure of the judgment roll to show that the reply served has not been filed, when the record indicates that the trial was conducted as if the reply had been filed.

Finding sustained by evidence.

3. The finding that, under the employment, plaintiffs were authorized to buy the coal and incur the necessary expense to run defendant's apartment building has ample support.

Finding based on conflicting testimony affirmed.

4. The finding that plaintiff's contract was terminated wrongfully by defendant was upon conflicting testimony and cannot be disturbed.

Damages not uncertain nor remote.

5. The damages flowing from a breach of contract were not so uncertain, contingent or remote as to preclude an award therefor to the party injured.

Breach of contract — damages reduced by expenses necessary.

6. Where a party claims unearned commissions as damages for breach of a contract under which the same were to be earned, the amount of such commissions must be reduced by what it would have cost by way of labor and expense to earn them had the contract not been breached.

[1]Reported in 185 N. W. 257.

Action in the municipal court of Minneapolis to recover $246.47 for breach of contract and expenses incurred. The case was tried before Baldwin, J., who when plaintiffs rested denied defendant's motion to dismiss the action, made findings and ordered judgment in favor of plaintiffs. Defendant's motion for judgment notwithstanding the decision or for a new trial, was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed with directions.

Margaret A. Young, pro se.

Thompson, Hessian & Fletcher, for respondents.

HOLT, J.

Plaintiffs are rental agents, and, during the year previous to November 1, 1917, were employed by defendant to manage, let and collect the rents for an apartment building owned by her in Minneapolis. They were to receive 5 per cent out of the rents collected, for their services. Accounts were sent to defendant monthly with a check for the balance left, after deducting the commission and the operating expenses. With the account for October, 1917, the last month of their first contract, and a check of $228, the balance for that month, plaintiffs sent her a letter, highly commendatory of the efficient and economical management they had given and requesting a renewal of their engagement. In response, defendant came to their office and a new contract was signed by her, employing them for the year beginning November 1, 1917.

When the November account arrived it inclosed a remittance of $60 as the balance over commissions and operating expenses, and the balance remitted with the December account was less than $75. Defendant thereupon took the management of the building from plaintiffs. They brought this action to recover damages for the breach of the contract, and for moneys paid out in operating the building. Defendant answered, alleging that she was induced to sign the contract by means of false and fraudulent misrepresentations of plaintiffs that the building had been economically managed, and that all the bills for the preceding year had been paid, also that plaintiffs were to exercise due and reason-

able diligence in managing the building, which they failed to do, and by reason thereof she resumed control in January, 1918. She also denied the allegations of the complaint in respect to disbursements sought to be recovered for coal and other expenses incurred by plaintiffs under the contract. The court made findings that defendant had no just cause for terminating the employment, awarded damages for breach of the contract in the sum of $132, and allowed most of the items claimed in the complaint for expenditures made by plaintiffs in defendant's behalf, less $72 of the January, 1918, rents, which plaintiffs had collected but not included in the accounts rendered. Defendant appeals from the judgment.

There is nothing to the claim that the municipal court did not have jurisdiction. The complaint states an action at law for breach of contract and the recovery of certain expenditures made for defendant under the contract. The total sum demanded was well within the amount which the court has power to give judgment for. The answer does not set forth a defense which requires affirmative relief from a court of equity before being available as such in an action at law. If it be established that this contract was obtained by misrepresentation or fraud, or if it be shown that plaintiffs were remiss in the performance of their services, defendant would have just cause to terminate the contract and a perfect defense to any claim for damages for its alleged breach. There was no counterclaim and no facts stated in the answer calling for the exercise of equitable powers by any court.

The reply seems to have been served, but was not filed. The trial proceeded as if it had been duly filed. It is too late to make the point in this court that defendant should have judgment for want of reply.

The court found that, under the authority of defendant, plaintiffs had paid out $178.37 for coal and other supplies for the building. This finding is sustained by the evidence to such an extent that we are not warranted in disturbing it. Much is made of the fact that the first agreement recited that, in consideration of their "renting and managing" the property, plaintiffs were to receive 5 per cent of the rent collected, whereas in the renewal the word "managing" is dropped. Hence it is claimed plaintiffs had no authority to buy coal or incur other op-

erating expenses pertaining to the renting of the building. The parties undoubtedly construed the last contract to require plaintiffs to not only make leases and collect rents, but to purchase the needed supplies and manage the building as during the previous year. The compensation was the same. And, what is more, defendant pleads that plaintiffs were to exercise due diligence in handling the property, and that, because of their failure, an excessive amount of coal was burned during the first two months of the last employment.

Had the court accepted defendant's testimony, good cause for her termination of the contract could well have been found, and that would have defeated plaintiffs' recovery of damages for the unearned commissions. But plaintiffs denied that any false representations were made when the contract was renewed, and, while admitting that some poor coal was purchased in November and December, 1917, offered as an excuse that there was then a coal shortage and difficult to obtain coal of any kind. We are not justified in holding the evidence insufficient to sustain the finding that defendant, "without just cause," took the management of the building and the collection of the rents thereof away from plaintiffs.

Defendant questions the right to the damages for unearned commissions, on the ground that they are uncertain, contingent and remote. This claim is not sustained. The commission was based upon the rents collected from an apartment building. It was during a period when there was little probability of lack of tenants. The building had been operated for some time. The evidence of the rents collected for the 10 months preceding and the 10 months succeeding the breach, was definite, and showed clearly that the whole amount was certain to a marked degree. It is more so than the probable profits in Schumaker v. Heinemann, 99 Wis. 251, 74 N. W. 785; Pittsburg Gauge Co. v. Ashton Valve Co. 184 Pa. St. 36, 39 Atl. 223, and Wells v. National Life Assn. of Hartford, 99 Fed. 222, 39 C. C. A. 476, 53 L.R.A. 33, where damages were predicated upon testimony showing what the past business had been.

Defendant also raises the point that the damages awarded are excessive and not warranted by the proof. There is substance to the conten-

tion. Obviously the court computed the damages at 5 per cent of the rents for the 10 months, deducting nothing for the work and expense of performance. Plaintiffs were relieved of that burden for the unexpired term of the contract, and the compensation or damages should be reduced accordingly. This is not a case of a wrongful discharge of a servant whose whole time was devoted to the service, in which case, unless he procures other employment, the wage furnishes the measure of damages for the unexpired part of the term. Here plaintiffs themselves did not do the work, but had an office force to perform these and like services for others. It is a case where the damages recoverable should be the net profits, and not the gross profits, as here allowed. In Wells v. National Life Assn. supra, the court says, with reference to the recovery of unearned commissions coming through the work of other agents after the defendant breached its contract with plaintiff, "some deduction must necessarily be made on account of the fact that he could incur no current expenses, nor render any personal service, in the procurement of this insurance thus obtained by the defendant through its other agents and agencies." On the findings plaintiffs were entitled to the unearned commission for the unexpired part of the year, less the expense or cost of securing tenants, collecting the rents and performing what was required of them had the contract remained in force. The measure of damages for wrongfully terminating an incompleted agreement, is the price fixed for a full performance, less what it will cost to complete it. Glaspie v. Glassow, 28 Minn. 158, 9 N. W. 669; Silberstein v. Duluth News-Tribune Co. 68 Minn. 430, 71 N. W. 622. Indeed, in Singer Mnfg. Co. v. Potts, 59 Minn. 240, 61 N. W. 23, the court went so far as to hold that, unless the allegations showed that the cost of performance was less than the compensation to be received, no cause of action for substantial damages for breach of the contract was stated.

For this reason the $132, awarded as damages for wrongfully terminating the employment, must be held excessive and not warranted by the testimony.

None of the other matters complained of require mention.

The judgment is reversed and the cause remanded, with direction to

the court below to grant defendant a new trial solely on the issue of the amount of damages recoverable on account of the wrongful termination of the contract.

Reversed and remanded with directions.

MIDLAND TRUST & SAVINGS BANK, AS ADMINISTRATOR OF THE ESTATE OF ANN NAGLE, DECEASED v. TERENCE W. NAGLE AND OTHERS.[1]

November 10, 1921.

No. 22,447.

Construction of deed.

1. A deed containing the provisions set out in the opinion, conveyed only a life estate to plaintiff's intestate. Title to so much of the land as was not conveyed in fee to the other grantees remained in the grantor, although there was no reservation written into the deed.

Sufficient consideration for release.

2. The grantor conveyed a two-thirds interest in fee to his brothers. Such conveyance was a detriment to him and a sufficient consideration for a release by plaintiff's intestate of his obligation to support her.

Action in the district court for Dakota county to determine adverse claims to certain land. The case was tried before Converse, J., who made findings and dismissed the action. From an order denying plaintiff's motion for amended findings or for a new trial, plaintiff appealed. Affirmed.

T. A. Alexander and *H. S. Locke,* for appellant.

Allen & Straight, for respondent.

LEES, C.

This is an action to determine adverse claims to land, in which the findings were against the plaintiff, and were followed by this appeal,

[1]Reported in 184 N. W. 1028.

which is from an order denying a motion for amended findings or a new trial.

The land was originally owned by John Nagle. January 19, 1898, he and his wife Ann conveyed it to their son Terence. The deed recited that the land conveyed was the grantors' homestead, reserved an estate for life to them and contained a condition to the effect that the grantee would support the grantors on the premises during their several lifetimes and would not encumber the land or sell or convey it except to his brothers or to his father or mother. If he failed to fulfil these conditions the deed was to become void. May 18, 1898, Terence executed a deed of the land, in which his mother Ann Nagle and his two brothers Joseph and Frank Nagle were named as grantees. The deed purported to grant all of the land to the grantees named therein. Immediately after the description there was written into the deed a clause reading as follows:

"In the following proportions and to each of said grantees the following interests to-wit:

"To said Joseph P. Nagle and Frank R. Nagle the Undivided two-thirds of said lands, subject to the life estate of Ann Nagle hereinafter named, To Have and to hold to them and their heirs forever, subject only to said estate for life.

"To said Ann Nagle The said lands and the whole thereof for and during the term of her natural life To Have and to Hold to her said Ann Nagle for and during the term of her natural life.

"And the said Ann Nagle for and in consideration of the foregoing conveyances to her and to her two sons Joseph P. Nagle and Frank R. Nagle does by the acceptance of this deed release the said Terence W. Nagle party of the first part, from all the covenants and agreements to be by him kept and performed as specified in a certain deed from John Nagle and Ann Nagle his wife to Terrence W. Nagle wherein the above described land is conveyed to said Terrence W. Nagle. Which deed bears date the 18th day of January, A. D. 1898."

The deed contained the usual habendum clause followed by the words, "and in the proportions hereinabove specified."

Ann Nagle died intestate September 9, 1913. Plaintiff is the ad-

ministrator of her estate. In its complaint it alleged that by this deed Mrs. Nagle became the owner of a life estate in all the land described therein and also of an undivided one-third in fee. Defendants assert that all Mrs. Nagle took under the deed was a life estate, and that the grantor retained the one-third interest in fee which was not conveyed to his two brothers. It is argued, in support of plaintiff's position, that by the granting clause in the deed all the land was conveyed; that there was no reservation of any interest to the grantor; that Mrs. Nagle already owned a life estate in the land, and hence there was no reason for conveying such an estate to her again, and that, unless a one-third interest in fee was conveyed to her, she parted with her right to support for no consideration whatever. The argument is plausible, but any force it might otherwise have is overcome by the provisions in the deed above set out.

In Witt v. St. Paul & N. P. Ry. Co. 38 Minn. 122, 35 N. W. 862, it was said that the cardinal rule of construction is to ascertain and give effect to the intention of the parties to the deed, and to this end the court must consider all parts of the instrument. This has been repeated in subsequent cases and is the rule which controls in the construction of this deed. Grueber v. Lindenmeier, 42 Minn. 99, 43 N. W. 964; Flaten v. City of Moorhead, 51 Minn. 518, 53 N. W. 807, 19 L.R.A. 195; Lawton v. Joesting, 96 Minn. 163, 104 N. W. 830.

To give the granting clause the effect plaintiff claims it has, would nullify the subsequent provisions of the deed. It would enlarge Mrs. Nagle's estate by adding a fee interest to it, whereas the explicit declaration of the grantor is that each grantee shall take the interests in and proportions of the land granted which he then proceeds to define. If he had intended to convey a fee interest to his mother, he not only failed to say so, but, on the contrary, has taken pains to say that she shall only hold the land for and during the term of her natural life. This language is controlling and limited the interest of plaintiff's intestate to a life estate. It cannot be said that there was no consideration for Mrs. Nagle's release of her right to support. When the deed was made, the grantor owned the land, subject only to the life estate of his father and mother. By his deed he deprived himself of the two-

thirds interest in the land which he conveyed to his brothers. In consideration thereof his mother released him from his obligation to support her. True she did not directly receive anything for her release, but the new arrangement was presumably detrimental to the interests of the grantor, and it is elementary that detriment to one party to a contract is no less a consideration than is benefit to the other party. 1 Dunnell, Minn. Dig. § 1750; Heitsch v. Cole, 47 Minn. 320, 50 N. W. 235. The fact that the grantor did not expressly reserve an interest in the land is unimportant. It is too plain to admit of argument that, when the owner of the fee conveys an undivided two-thirds interest to others, he remains the owner of the one-third not conveyed, whether he reserves it or not.

The order denying a new trial is affirmed.

WILLIAM DUNN, AS FATHER OF COLIN DUNN, A MINOR v. REEVES COAL YARDS COMPANY, INC.[1]

November 10, 1921.

No. 22,457.

Truck owner delivering coal servant of fuel dealer.

Waters v. Pioneer Fuel Co. 52 Minn. 474, to the effect that a person temporarily employed by a coal dealer to haul and deliver by means of his own conveyance and facilities coal and fuel to a patron of the dealer at a stipulated rate per ton or load, is for the time being the agent and servant of the dealer and not an independent contractor, followed and applied.

Action in the district court for Hennepin county to recover $25,000 damages for injuries to plaintiff's minor son. The case was tried before Nye, J., who at the close of the testimony granted defendant's motion for a directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

[1]Reported in 184 N. W. 1027.

B. W. Wilder and *O. L. Bruce,* for appellant.
Ernest E. Watson, for respondent.

BROWN, C. J.

This action was brought to recover for injuries to plaintiff's minor son, claimed to have been caused by the negligent operation of an automobile truck by one McCann, an employe and servant of defendant. At the conclusion of the trial below a verdict was directed for defendant and plaintiff appealed from an order denying a new trial.

There is no question on the record as to the injury complained of, and that it was caused by the negligence of McCann in the operation of his truck upon and over one of the streets of the city of Minneapolis is made clear by the evidence, at least the case must be so considered on this appeal. In directing a verdict for defendant the learned trial court held, on the evidence presented, that McCann was not at the time the agent or servant of defendant, hence that defendant cannot be charged with his wrongdoing. The correctness of that conclusion presents the only question on the appeal.

The facts are not in substantial dispute. It appears that defendant is a retail coal and fuel dealer doing business in the city of Minneapolis. In the usual conduct of its business a sale of a quantity of coal or other fuel includes a delivery thereof upon the premises of the purchaser. To effect such deliveries to its numerous customers defendant employed, among others, McCann, who owned and operated the truck in question in his business of carting and delivering commodities and articles of trade for hire. He was engaged in that work on his own account, and in no way connected or associated with defendant, except as he was so employed by defendant from time to time as its business might justify and require. He was paid for such services, not the value thereof per day, week or month, as the term of employment might be, but an agreed amount per ton for the quantity of coal carted and delivered. McCann was in the service of defendant only when so engaged, and was in such service at the time complained of and had been continuously for several days prior thereto. When charged with the delivery of coal to be paid C. O. D. he was authorized

to and did collect and account therefor to defendant. He collected for the delivery on the particular occasion. Defendant furnished him assistance from its regular employes in loading at the yards and unloading at the place of delivery when necessary.

The case, on these facts, cannot be distinguished from Waters v. Pioneer Fuel Co. 52 Minn. 474, 55 N. W. 52, 38 Am. St. 564, which we follow and apply, holding that the question whether McCann was, at the time of the accident, an independent contractor, or the servant of defendant, if not to be answered in the affirmative as a matter of law, was at least a question of fact for the jury, and the directed verdict was error. The Waters case has never been criticised, doubted or overruled, and is not out of harmony with adjudications on similar facts in other jurisdictions. Standard Oil Co. v. Parkinson, 152 Fed. 681, 82 C.C.A. 29; Murphy v. Herold Co. 137 Wis. 609, 617, 119 N. W. 294; O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764; White, Personal Injuries, 601; Cooley, Torts (3d ed.) 1101; Shearman & Redfield, Neg. (5th ed.) 248. The case has been often cited with approval in later decisions of our own, though not in all instances in cases involving identical facts. Crandall v. Boutell, 95 Minn. 114, 116, 103 N. W. 890, 5 Ann. Cas. 122; State v. District Court of St. Louis County, 128 Minn. 43, 150 N. W. 211; Winters v. American Radiator Co. 128 Minn. 508, 151 N. W. 277, L.R.A. 1915D, 476; Zuponcic v. Val Blatz Brewing Co. 131 Minn. 112, 154 N. W. 790; Boll v. C. S. Brackett Co. 134 Minn. 268, 158 N. W. 609, 159 N. W. 1095.

Following the Waters case, which does not appear to have been called to the attention of the learned trial court, the order appealed from must be and is reversed, and a new trial granted.

FRED C. HOLMAN v. W. N. S. IVINS.[1]

November 10, 1921.

No. 22,460.

Right of way at street intersection — construction of statute.

Subdivision 2 of section 2552, G. S. 1913, as amended and as found in 1917 Supp. to G. S. 1913, requiring a driver of a vehicle approaching or crossing a street intersection to yield the right of way to any other vehicle approaching from his right, is applicable where a driver attempts to cross the street along which he is driving to enter a cross street which does not continue on the other side of the first mentioned street.

Action in the district court for Ramsey county to recover $533.19 for injuries to plaintiff's automobile. The answer set up a counterclaim of $191. The case was tried before Haupt, J., and a jury which returned a verdict for $541.15. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Samuel A. Anderson, for appellant.

Charles A. Lethert, for respondent.

HOLT, J.

Summit avenue runs east and west and has a 55-foot driveway for some distance on both sides of where Mackubin street enters it from the north. The latter street goes no further south than to Summit. Plaintiff was driving his automobile westerly on Summit avenue approaching Mackubin street, when defendant, driving easterly on that avenue, was nearing the same street. The latter turned to go north upon Mackubin street, but the right front spring of plaintiff's car caught in the right rear wheel of defendant's, and both vehicles were considerably damaged. Plaintiff sued to recover the damages resulting to him from the collision, and defendant answered, denying responsibility and

[1]Reported in 184 N. W. 1026.

counterclaiming for the damages he sustained. Plaintiff recovered. Defendant appeals from the order denying a new trial.

The only error assigned questions the propriety of submitting for the jury's consideration the statute reading: "The driver of any vehicle approaching or crossing a street or highway intersection shall give the right of way to any other vehicle approaching from his right on the intersecting street or highway, and shall have the right of way at such crossing over any vehicle approaching from his left on such intersecting street or highway." (Section 2552, G. S. 1913, as amended by the addition of subdivision 2 in section 22, c. 119, p. 164, Laws 1917).

The claim of defendant is that the statute does not apply because Mackubin street ends at Summit avenue, and does not continue on to the south. At places where two streets cross there is a space common to both, on which space the traveler must yield the right of way to anyone approaching on his right. So we think there is a space in common to both streets where one street opens into another only on one side. The space to the north of the center line of Summit avenue and within the east and west line of Mackubin street extended, is such a space. As soon as defendant turned towards this space, plaintiff was approaching to defendant's right, and the latter's duty was to yield the right of way. Again plaintiff traveling on Summit avenue westerly, and on the north half thereof, was bound to give the right of way to one driving south on Mackubin street into Summit avenue. There is an intersection, at least as to the northerly half of the space in common there would have been, had Mackubin street continued to the south. We are of the opinion that the north half of Summit avenue must be held to be intersected by Mackubin street, and hence the statute quoted was properly applied. Indeed, the situation calls for the observance of the rule of the statute even more urgently than where both streets pass on beyond.

The fact that there is a statute, section 2634, G. S. 1913, requiring vehicles in turning into an intersecting street, or in making a turn at an intersection to keep to the right of the center thereof, does not suspend the operation of the right of way statute while the turn is made. In turning the driver of the vehicle must heed the requirements of

both statutes mentioned, as well as the one found in section 2635, G. S. 1913, relating to the speed in turning a corner. They are not contradictory, and may all be applicable in a given case.

The order is affirmed.

A. J. AMUNDSON, AS ADMINISTRATOR OF THE ESTATE OF PEDER SAMDAHL, DECEASED v. ANTON M. HANSON AND ANOTHER.

SARAH SAMDAHL, APPELLANT.[1]

November 10, 1921.

No. 22,468.

Administrator's contract of sale not binding until confirmed by probate court.

1. An administrator, licensed to sell real estate at private sale, cannot make a binding contract of sale. He can only report a proposed sale to the probate court, and the proposed purchaser acquires no interest in the land until the sale has been confirmed by the court and the purchaser has complied with the conditions prescribed by the court.

No collateral attack on probate records.

2. The probate records import verity and cannot be impeached in a collateral proceeding.

Where confirmation is revoked for default of buyer, his wife acquires no interest.

3. Where the court confirms a sale and directs the execution of a deed on compliance with the specified terms, but the purchaser fails to comply therewith, the court has power to revoke its order, or to amend it so as to authorize a sale to another, and where this is done, and the sale made to the other, the wife of the first purchaser acquires no marital interest in the land.

No collateral attack on amending order for irregularity in procedure.

4. Where the court has power to make such an amendment, irregularities in the procedure cannot be taken advantage of in a collateral proceeding.

[1]Reported in 185 N. W. 252.

Wife of buyer acquires no interest when her husband procures conveyances to another.

5. The fact that a husband pays the purchase price for land which he causes to be conveyed to another, gives his wife no marital interest therein.

In an action in the district court for Chippewa county to determine whether a certain deed of conveyance of real estate was procured through undue influence upon plaintiff's intestate, Sarah Samdahl and four others filed a complaint in intervention to have the report of sale of real estate and order of probate court confirming sale and the records thereof, amended by striking therefrom the words "as agent for Anton M. Hanson, deed to be executed to Anton M. Hanson," and to set aside the deed from Anton M. Hanson and wife to Julia Forest. The facts will be found in the opinion. The case was tried before Qvale, J., who made findings and ordered judgment in favor of defendants and Julia Forest and her husband, A. H. Forest. The motion of intervener Sarah Samdahl for amended findings or for a new trial, was denied. From the judgment entered pursuant to the order for judgment, Sarah Samdahl appealed. Affirmed.

McDowell & Fosseen, for appellant.

L. D. Barnard and *Bert O. Loe,* for respondents.

TAYLOR, C.

Peder Samdahl, a resident of Chippewa county, died intestate March 20, 1918. He had been married twice. The defendants, Pauline Hanson and Julia Forest, are the children of his first marriage and the other defendants are their husbands. The intervener, Sarah Samdahl, is his second wife and surviving widow, and the other interveners are the children of his second marriage. The present controversy is between the defendants and the intervener, Sarah Samdahl, who is the sole appellant and will be referred to as the intervener hereafter.

Mr. Samdahl maintained cordial relations with the children of his first marriage, and, perhaps on this account, discord and contention arose between him and the intervener and her children. He gave substantial aid to his children, however, and made no difference between

them on account of the discordant family relations.

Some time prior to April, 1915, one John Grythin died seized in fee of 240 acres of land in Chippewa county, and one I. P. Flaten was duly appointed administrator of his estate. On April 12, 1915, Flaten, as such administrator, was duly licensed by the probate court to sell the above mentioned land at private sale. On May 3, 1915, Flaten made a written contract with Samdahl, by which he agreed to sell the land, subject to outstanding farming leases, to Samdahl for $14,400, of which $900 was to be paid on delivery of the contract, and $13,500 on July 1, 1915. On May 10, 1915, Flaten, without mentioning the written contract, reported to the probate court that, under and pursuant to the license issued to him, he had sold the land to Peder Samdahl for the sum of $14,400—$900 in cash and $13,500 on July 1, 1915, and asked the court to confirm the sale and authorize the execution of a deed of conveyance. On the same day the probate court made an order, in the usual form, confirming the sale and authorizing the administrator to execute a deed of conveyance to the purchaser, "upon compliance by him with the terms of said sale."

On the following day, May 11, 1915, Samdahl requested Flaten to arrange the matter so that the deed would be made to defendant Anton M. Hanson. On the next day, May 12, 1915, Flaten and Samdahl conferred with the judge of probate for the purpose of making the desired change. The order had been made on a printed form which contained a blank space for the name or names of the purchaser or purchasers. Samdahl's name had been written in this space. As a result of the conference, the judge of probate changed or amended the order by inserting in this space after the name of Samdahl the words "as agent for Anton M. Hanson, deed to be made to Anton M. Hanson." A like change was made in the report of sale. As a result of these changes the records of the probate court show that the sale was made to Samdahl as agent for Hanson, and that the deed was to be executed to Hanson on compliance by him with the terms of the sale. On June 30, 1915, Samdahl paid the remainder of the purchase price and Flaten executed an administrator's deed of the land to Hanson. It appears that Samdahl intended to give this land to his two daughters, Pauline Hanson and

Julia Forest, that he directed Hanson to divide the land equally between them, and that Hanson subsequently conveyed an undivided one-half of it to Julia Forest. It also appears that Samdahl's object in causing the land to be conveyed to Hanson was to place it where his wife could not thwart or hinder his purpose to give it to these two daughters.

The sole question presented is whether the interest which the statute gives a wife in the real estate of her husband attached to the land in controversy in favor of the intervener.

Unless either the legal or equitable title to the land vested in Peder Samdahl at some time, there was nothing to which the marital rights of the intervener could attach. There is, and could be, no claim that the legal title ever vested in him, and the question for consideration is whether the equitable title vested in him. It is claimed that the written contract with Flaten, the administrator of the Grythin estate, gave him the equitable title. Such a contract with the owner of the land might, perhaps, give an equitable title to the vendee. But Flaten was not the owner of the land, and no contract made by him at that time and in that manner could create any interest in the land or be enforced against it, at least until translated into a judgment or decree of the probate court. Myrick v. Coursalle, 32 Minn. 153, 19 N. W. 736. Under his license to sell he could make no binding contract, but could only report a proposed sale to the court, and it then rested with the court to determine whether the sale should be made, G. S. 1913, § 7369; and the purchaser would acquire no rights which he could enforce against the land or the heirs, until the court had confirmed the sale and he had complied with the conditions prescribed by the court. It is clear that Samdahl acquired no interest in the land under the written contract with Flaten, for it was beyond the power of Flaten to convey an interest therein by such a contract.

It is claimed that the original order of the probate court, confirming the sale, named Samdahl as purchaser, and operated to vest him with the equitable title, and that the subsequent change or amendment of the order was void. The probate records, as produced at the trial, show that the court confirmed a sale to Hanson and authorized a conveyance

to Hanson, and the evidence presented for the purpose of showing that a change had been made in the record was objected to on the ground that it was incompetent, inadmissible and tended "to impeach in a collateral proceeding the verity of the records of the probate court." We think this objection well taken. The records of the probate court import verity and cannot be impeached in this manner in this collateral proceeding. Dayton v. Mintzer, 22 Minn. 393; Curran v. Kuby, 37 Minn. 330, 33 N. W. 907; Logenfiel v. Richter, 60 Minn. 49, 61 N. W. 826; Kurtz v. St. Paul & D. R. Co. 61 Minn. 18, 63 N. W. 1; Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302; Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851.

But even if the record could be impeached in this manner, it would not avail the intervener. Assuming that the order was made and subsequently changed as claimed by the intervener, the original order confirmed a sale to Samdahl and authorized a conveyance to him on compliance with the terms of the sale. The order was conditional only and Samdahl could acquire no interest in the property until he complied with the conditions. He did not act upon this order nor comply with its conditions. Instead of doing so he made an application to have the sale changed from himself as purchaser to Hanson as purchaser. This was, in effect, a refusal to make the purchase as provided in the original order. Upon a proper application and showing, the court had power, at least in case of a private sale, to revoke or amend its order at any time before the purchaser had complied with its conditions or received his deed. G. S. 1913, §§ 7211, 7490; Savela v. Erickson, 138 Minn. 93, 163 N. W. 1029; Greenough v. Small, 137 Pa. 132, 20 Atl. 553, 21 Am. St. 859; Gary, Probate Law, § 532; Woerner, American Law of Administration, § 479.

In Davis v. Touchstone, 45 Tex. 490, it was held that the court, after confirming an administrator's sale to one purchaser, could change its order and confirm the sale to a different purchaser if the first consented thereto. In State v. Probate Court of Ramsey County, 19 Minn. 85 (117) and State v. Probate Court of Sibley County, 33 Minn. 94, 22 N. W. 10, cited by the intervener, it was held that after a sale had been confirmed by the probate court and the purchaser had paid the

purchase price and received his deed, it could not then be set aside by the probate court as the title had vested in the purchaser and passed out of the control of that court. But in the latter case the court at least impliedly recognized that the statute, passed after the decision in the first case, authorized the probate court to vacate such orders in proper cases, if the title had not passed beyond its jurisdiction. The application made in the present case was informal, and the amendment was made in a manner not to be commended, but as the court had power to make the order which it did make, these were irregularities merely which cannot be taken advantage of in a collateral proceeding like this. Having failed and refused to comply with the terms of the original order, Samdahl acquired no interest under it which could be enforced against the land or against the heirs. He acquired no interest under the amended order, for he was not the purchaser under that order. The sale made under the amended order and evidenced by the deed to Hanson was the only sale which conveyed any interest in the land, for it was the only sale authorized by the probate court in which the conditions specified by the court were complied with on the part of the purchaser.

Paying the consideration for the conveyance to Hanson, gave Samdahl no interest in the land. G. S. 1913, § 6706, and the numerous cases in which that statute has been applied. There may be circumstances under which a conveyance to a third party for a consideration paid by the husband will operate as such a fraud on the wife that a court of equity will interfere in her behalf, but no such circumstances are shown here, and the intervener's complaint makes no claim of that nature.

Samdahl was a man of means. He had a farm of 640 acres on which he resided with his family and also had a large amount of personal property. The court found that he died possessed of property of the value of at least $70,000, exclusive of that in controversy. He had the indisputable right to give money to these two daughters, and we think he had an equal right to apply it in payment for land to be conveyed to them instead of giving it to them outright.

As our conclusions accord with those of the learned trial court, the judgment is affirmed.

STATE EX REL. LOUIS BERMAN v. EARLE BROWN, AS SHERIFF OF HENNEPIN COUNTY.[1]

November 10, 1921.

No. 22,702.

Penalty for illegal transportation of liquor.

The penalty for unlawfully transporting intoxicating liquor, under chapter 455, Laws of 1919, supplemented by chapter 335, Laws of 1921, and amended by chapter 391, Laws of 1921, is the destruction of the liquor, the forfeiture of the vehicle in which it is being transported, and a fine and imprisonment.

Upon the relation of Louis Berman the district court for Hennepin county granted its writ of habeas corpus directed to Earle Brown, as sheriff. From an order discharging the writ, Nye, J., and remanding relator to the custody of respondent, relator appealed. Affirmed.

Brady, Robertson & Bonner, for appellant.

Floyd B. Olson, County Attorney, for respondent.

LEES, C.

The relator was indicted for the crime of transporting intoxicating liquor, entered a plea of guilty and was sentenced to pay a fine of $150 and be confined in the workhouse of the city of Minneapolis for 30 days, and, in default of the payment of the fine, for an additional 30 days. A commitment was issued, under which he was imprisoned. Alleging that the court was without jurisdiction to sentence him to pay a fine or to be imprisoned, he obtained a writ of habeas corpus from the district court of Hennepin county. The writ was discharged and he appealed.

He contends that the sentence passed upon him was beyond the jurisdiction of the court, for the reason that under chapters 335 and 391, pp. 507, 589, Laws of 1921, the offense of transporting intoxicating

[1]Reported in 184 N. W. 1025.

liquor is not punishable either by fine or by imprisonment. Chapter 455, p. 537, Laws of 1919, prohibited the transportation of intoxicating liquor within this state. State v. Brothers, 144 Minn. 337, 175 N. W. 685. Subdivision A of section 25 of that act provides that the penalty for manufacturing or selling such liquor (transportation not being mentioned) shall be a fine for the first offense and a fine and imprisonment for each subsequent offense. Subdivision E provides a like penalty for a wilful failure or neglect to perform any duty imposed by the act or for any violation of any of its provisions for which no special penalty is prescribed. We think this subdivision prescribed the penalty for the offense of unlawfully transporting liquor.

Chapter 335, p. 507, Laws of 1921, was enacted to provide for the enforcement of the laws prohibiting such transportation and was declared to be supplemental to the act of 1919 and not to modify or repeal any of its provisions. It provides for the seizure and destruction of the liquor and for the seizure and sale of the vehicle in which it is transported, the proceeds of such sale to be paid into the county treasury of the county where the seizure takes place.

Section 24 of chapter 455, p. 547, Laws of 1919, charged certain public officers with the duty of enforcing the provisions of that act and declared that any official who should wilfully refuse or neglect to perform a duty imposed by the act should be removed from office and forfeit not less than $100 nor more than $500, to be recovered in an action against him personally or on his official bond. This section was amended by section 14, chapter 391, p. 597, Laws of 1921, but the forfeiture clause in the original section was not disturbed. Section 25 of the act of 1919 was also amended. As amended, subdivision E thereof reads: "Any person who shall wilfully fail or neglect to perform any duty imposed by this Act or who shall violate any of the provisions thereof, for which no special penalty or forfeiture is prescribed herein shall upon conviction thereof * * * be punished," etc.

It is contended in relator's behalf that a special penalty or forfeiture was prescribed for the unlawful transportation of liquor by chapter 335, p. 507, Laws of 1921, providing for the seizure and destruction of the liquor and the forfeiture of the vehicle in which it is being transported,

that there is no other penalty and hence no authority for the imposition of a fine or a sentence to imprisonment. We cannot place this construction upon the several acts in question. The confiscation of the liquor and the vehicle in which it is carried was in addition to the penalty prescribed by the 1919 act. The words "or forfeiture," inserted in subdivision E by the 1921 amendment thereto, clearly refer to the forfeiture exacted from a public officer wilfully refusing or neglecting to perform an official duty required by the law, and was probably intended to exempt him from punishment by fine and imprisonment in addition to the forfeiture provided for, on the theory that, if subject to both, the penalty would be too severe.

The order discharging the writ is therefore affirmed.

VERNIE A. LINDELL v. CHARLES A. LINDELL AND MARY LINDELL.[1]

November 18, 1921.

No. 22,338.

Finding of possession of land sustained by evidence.

1. A finding that plaintiff was in possession of land, which was the subject matter of an action to determine adverse claims, is sustained by the evidence.

Equitable lien sustained by findings — advances by parent expended in improvements by son.

2. The facts found and related in the opinion entitled defendant to claim an equitable lien on the land to secure the repayment of money advanced to his son and used to pay for improvements which enabled plaintiff to enforce a claim to the land by virtue of an oral gift from defendant to the son to whose rights plaintiff has succeeded. It is not indispensable to such a lien that it is founded on a contract indicating an intention to create it. It may arise from an application of the maxim that he who seeks equity must do equity whether it could or could not

[1]Reported in 185 N. W. 929.

have been enforced in an action brought to establish it, if defendant's right to assert it grows out of the controversy before the court, is connected with the subject matter thereof, and is presented in the pleadings and proof.

Action in the district court for Goodhue county to quiet title by one in possession. The substance of the complaint and of the answers is given in the third and fourth paragraphs of the opinion. The case was tried before Johnson, J., who made findings, as stated in the fifth paragraph of the opinion, and ordered judgment in favor of plaintiff. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Reversed.

A. J. Rockne, for appellants.

F. M. Wilson and *T. R. Johnson,* for respondent.

LEES, C.

This is a sequel to Lindell v. Lindell, 135 Minn. 368, 160 N. W. 1031. The plaintiff here was the defendant in that action and Charles A. Lindell was plaintiff. The action was one in ejectment, defended on the ground that an oral gift of the land in question had been made by Charles A. Lindell to his son Sidney Lindell, who was defendant's husband and had died intestate, leaving her as his sole heir at law. It was held that such a gift had been made and that the donee had taken possession of the land and made permanent improvements thereon, and therefore ejectment would not lie. The Yale Law Journal, Vol. 26, p. 592, contains an interesting comment on the case.

The present action was brought on the theory that, since Charles A. Lindell had the record title to the land, and his wife, who was joined as a party defendant, was not a party to the previous action, they were adverse claimants whose rights, if any, could be barred by an action to determine their claims to the land.

The complaint alleged the making of the gift, its acceptance, the making of substantial improvements in reliance thereon, the death of the donee, plaintiff's succession to his rights by virtue of the law of descent and her continued possession of the land. The complaint also

alleged that she had requested defendants and they had refused to execute a written relinquishment of any apparent claim they might have to the land in order that the cloud on plaintiff's title might be removed, and concluded with a prayer that defendants be adjudged to have no estate or interest in or lien upon the land and that plaintiff be declared to be the owner in fee.

The answer of the defendant Mary Lindell was a general denial. The answer of the defendant Charles A. Lindell alleged, among other things, that he had furnished $3,000 to his son to pay the cost of the buildings he had erected on the land, that it was so used, and in equity and good conscience plaintiff ought not to be permitted to obtain full title without repaying the money so advanced.

The trial court found that Sidney had borrowed $650 from his brother Arthur, giving him his note therefor signed by their father as a joint maker; that he had also borrowed $800 from his father, giving him his individual note therefor, and that the money borrowed had been used to pay for materials and labor furnished in constructing the buildings which Sidney had erected. It was also found that there was no contract between Sidney and his father, which gave the latter a right to claim a lien on the land as security for the money so borrowed; that after Sidney's death the $650 note was filed and allowed as a claim against his estate and a dividend of 13.31 per cent and no more paid thereon, his estate being insufficient to provide for the payment in full of all claims filed against it. The conclusion of the trial court was that defendants had no interest in or lien on the land. In a memorandum the learned trial judge said "it must be conceded that it would be nothing out of the way for the daughter-in-law to reimburse Charles A. Lindell for the money he loaned to Sidney and to make him whole on the liability he incurred in signing Sidney's note to Arthur," but that a general creditor has no lien, equitable or otherwise, upon any specific property of the debtor, unless it is based on some express or implied contract or some relation like cotenancy, or where there is a showing of bad faith or fraud. The correctness of this conclusion presents the principal question in the case. Defendants moved for judgment notwithstanding the order and decision of the trial court, and, if that was

denied, for a new trial, and have appealed from an order denying the motion in all respects.

Before disposing of the principal question, reference should be made to some other features of the case of minor importance.

1. Defendants' contention that plaintiff failed to show that she was in the possession of the land when she brought her action cannot be sustained. The court found that she had possession and the finding is sustained by the evidence.

2. All questions relating to the rights of the defendant Mary Lindell have become unimportant, for the reason that since the appeal was taken she has died, and hence her inchoate rights in the land have been extinguished.

3. The principal question in the case is not free from doubt.

The books abound in statements that an equitable lien exists when there is a contract, express or implied, sufficiently indicating an intention to make some particular property a security for a debt or other obligation, as, for example, where the owner of the property promises to transfer it as security for his debt but neglects to do so. However, the existence of such a contract is not an indispensable element of an equitable lien. It may arise wholly from considerations of right and justice and the application to particular facts of the maxims which lie at the foundation of equitable jurisprudence. 3 Pomeroy, Eq. Jur. § 1238; 17 R. C. L. p. 605. One of the most familiar of these maxims is that he who seeks equity must do equity. The principle thus expressed governs the courts in administering all kinds of equitable relief in any controversy where its application may be necessary to work out complete justice. 1 Pom. Eq. Jur. § 385. The consensus of opinion appears to be that the rule only applies where the plaintiff invokes the aid of a court to obtain some form of equitable relief, and where, but for the operation of the rule, he would be entitled to the relief he demands. It is agreed that under the operation of the rule the defendant may be awarded equitable relief which he could not have secured in an independent suit brought to obtain it. 1 Pom. Eq. Jur. § 386.

The rule does not apply where the relief sought by the plaintiff and the equitable right claimed by the defendant belong to or grow out of

two entirely separate and distinct matters or transactions. Defendant's right to relief must be connected with the subject matter of the suit. His adverse equity must grow out of the very controversy before the court or out of such transactions as the record shows were part of its history, or where it is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the plaintiffs to explain or refute the charges. 1 Pom. Eq. Jur. § 387; 1 Story, Eq. Jur. § 75; 21 C. J. 177; 10 R. C. L. p. 395; Comstock v. Johnson, 46 N. Y. 615; Cuthbertson v. Morgan, 149 N. C. 72, 62 S. E. 744; Otis v. Gregory, 111 Ind. 504, 13 N. E. 39; Bourgeois v. Risley Real Estate Co. 82 N. J. Eq. 211, 88 Atl. 199. There are some cases laying down a broader rule, but they are not in accord with the weight of authority. See 1 Pom. Eq. Jur. pp. 721, 722; 21 C. J. p. 176, note 39 (b).

In applying the maxim a court is invested with no arbitrary discretion, that is, a judge may not impose conditions which in his individual opinion would work substantial justice between the parties. Plaintiff may only be required to do that which fixed legal principles make it his duty to do. 10 R. C. L. pp. 394, 395; 21 C. J. pp. 176, 177; Cuthbertson v. Morgan, supra; Alexander v. Schaffer, 38 Neb. 812, 57 N. W. 541; Finch v. Finch, 10 Oh. St. 501.

We think the undisputed facts bring this case within the application of the principle expressed in the maxim. The subject matter of the litigation is the land. Plaintiff claims it by virtue of the parol gift to her husband. His father had retained the record title and it was a cloud on the title her husband acquired by the gift and to which she had succeeded. To remove the cloud she invoked the equitable powers of the court. To secure the court's aid she was obliged to plead and prove that her husband made improvements on the land. It appeared that the improvements were paid for in part with money furnished by the donor of the land. The right she is asserting sprung from the transactions with which the furnishing of the money was directly connected. It would be contrary to right and justice to permit plaintiff to assert a title based on the making of improvements partly paid for with money furnished by the defendant Charles A. Lindell, while refusing to rec-

ognize his claim for the repayment of the money as a condition precedent to the establishment of her title to the land. Under the findings of fact we hold that the defendant Charles A. Lindell was entitled to claim an equitable lien on the land to secure the repayment of the money advanced to his son Sidney on the notes mentioned in the findings.

The order appealed from is reversed and the case remanded for further proceedings in accordance herewith.

On December 23, 1921, the following opinion was filed:

PER CURIAM.

Respondent asks for a rehearing to argue the question of whether appellants' lien could attach to land which was the homestead of Sidney Lindell.

The trial court found that after their marriage on October 15, 1913, Sidney and the respondent resided in the dwelling house he constructed on the land. There were no buildings on it in 1911. It did not become a homestead until the house was built and Sidney began to occupy it. That date is not determined by the findings. The evidence indicates that it was about four weeks prior to his marriage. The money had been advanced and the lien attached long before. There is no proof that the land was a homestead before the loans were made. The question suggested in the petition does not arise upon the record before us.

Petition denied.

LIVE STOCK STATE BANK v. ROY HISE AND AMERICAN CATTLE COMPANY.

PERCY VITTUM & COMPANY, GARNISHEE. FIRST NATIONAL BANK OF POPLAR, MONTANA, APPELLANT-INTERVENER.[1]

November 18, 1921.

No. 22,429.

Draft not operative as assignment of funds with drawee until accepted.

1. A draft or bill of exchange, not drawn against a specific fund in the hands of the drawee, does not constitute an assignment of general funds in his hands, and the drawee is not liable thereon until he accepts the same.

Parol evidence inadmissible to show general draft was drawn on special fund.

2. Parol evidence is inadmissible to show that the parties intended to draw upon a particular fund where the bill of exchange is general in form.

Garnishment — lien not subject to rights of holder of unaccepted bill of exchange.

3. The lien of a garnishment of funds in the hands of the drawee arising from the service of the garnishee summons upon him prior to the acceptance or knowledge or notice of the outstanding bill of exchange, *held* paramount to the rights of the holder of the bill, following Lewis v. Traders Bank, 30 Minn. 134.

No implied acceptance of bill where drawee was garnished before notice of bill.

4. The drawer of the bill had shipped certain cattle to the drawee for sale on the market to the credit of the drawer, and the cattle were sold, but without notice or knowledge of the outstanding bill, and before notice thereof the garnishment intervened; *held* that there was no implied acceptance of the bill as against the creditors of the drawer.

[1]Reported in 185 N. W. 498.

Action in the district court for Hennepin county to recover $5,000 upon a promissory note. The garnishee disclosed an indebtedness of $3,765.46, and the First National Bank of Poplar, Montana, claiming this fund, filed its complaint in intervention. The case was tried before Nye, J., who made findings and ordered judgment in favor of plaintiff. From an order denying its motion to amend the findings and conclusions in certain respects, intervener appealed. Affirmed.

D. L. Grannis, for appellant.

Herbert P. Keller, B. J. Broady and *Jesse Van Valkenburg,* for respondents.

BROWN, C. J.

Action upon a promissory note given by defendant Hise to defendant American Cattle Company and by that company sold and transferred to plaintiff. At the time of the commencement of the action garnishment summons was issued and duly served upon the garnishee, Percy Vittum & Company, a corporation doing a general live stock business at the South St. Paul stockyards. The garnishee disclosed an indebtedness to defendant Hise in the sum of $3,765.46. Thereafter the First National Bank of Poplar, Montana, intervened in the action, claiming by its complaint of intervention the sole ownership of the indebtedness so disclosed. The allegations of the intervention complaint were put in issue by the plaintiff. The issue thus raised thereafter duly came on for trial, and after hearing the evidence presented by the respective parties the court decided that intervener had no valid claim to the indebtedness as against plaintiff under the garnishment, and judgment was ordered accordingly. Intervener appealed from an order denying a motion for certain amendments to the findings or for a new trial.

The facts as disclosed by the findings of the trial court, which are fully supported by the evidence, so far as material to the question presented by the appeal, are as follows: Hise was a cattle dealer residing at Poplar, Montana, where he purchased and shipped cattle for sale to the South St. Paul stockyards. He had shipped several carloads to the garnishee, Percy Vittum & Company, which had been sold and the proceeds credited to Hise account with garnishee. But all sales prior to

the one involved in this action are of no special importance and further detail of the facts in reference to them need not be here made. The garnishee had by letter of credit undertaken to become responsible to intervener for the payment of drafts drawn by Hise against such shipments, upon the conditions named in the written letter of credit. But in this transaction the letter of credit was neither relied upon by intervener nor complied with. So we pass that feature of the record without further comment.

On September 4, 1919, Hise drew a sight draft on the garnishee payable to the intervener, and intervener credited Hise on its books for the amount thereof. The draft was in the following language and form:

"The First National Bank,

"Poplar, Montana, Sept. 4, 1919.

"At sight, pay to the order of the First National Bank of Poplar, $4865.00, (Forty Eight Hundred Sixty-Five and no/100 Dollars). Value received and charge same to the account of

"With exchange. Roy Hise.

"To Percy Vittum & Co.,

"South St. Paul, Minn."

On the following day, September 5, Hise shipped to the garnishee at South St. Paul two cars of cattle to be sold by the garnishee and credited on his account. On the same day intervener wired the Stock Yards National Bank at South St. Paul, the inquiry, "Will you honor draft of Roy Hise on Percy Vittum for forty eight hundred sixty-five dollars?" In response the Stock Yards Bank wired back: "Advise by wire how many cattle and when shipping." To which intervener made no response. The shipment of cattle consigned to tne garnishee arrived at the stockyards on September 7, and on the early morning of the eighth the cattle in the usual course of trade were sold, and the proceeds, less certain deductions, credited to Hise on the books of the garnishee. At one o'clock in the afternoon of that day the draft reached the Stock Yards Bank and was promptly presented to garnishee for payment. A few hours prior to such presentation the garnishee sum-

mons in this action had been served, and for that and the further reason that garnishee was then indebted to Hise in the sum of $3,765.46 only, acceptance and payment of the draft were refused. No bill of lading of the consigned cattle accompanied the draft. And neither plaintiff in the action nor garnishee had any notice or knowledge of the draft until after the service of the garnishee summons, at which time the cattle had been sold and the proceeds applied partly in payment of an existing indebtedness due the garnishee from Hise, the balance being credited to him on its books.

The contention of appellant is that the draft constituted an equitable assignment of the funds to be derived from the particular shipment of cattle, which the garnishee received and sold, and that there was an acceptance of the draft by the garnishee, first when the cattle were taken and sold on the market, and second, by force of the letter of credit previously issued to intervener. We are unable to sustain this view of the law, as applied to the facts here involved. The draft was not drawn on a particular fund, but generally against any money in the hands of the garnishee then due or owing to Hise. No such fund existed; the garnishee was not then indebted to Hise, the contrary being that Hise was the debtor to garnishee. The draft therefore created no liability on the part of the garnishee until acceptance; there was no equitable or other assignment of prospective funds to come into the garnishee's hands in the future. The law on the subject is well settled, at least in this state. Lewis v. Traders Bank, 30 Minn. 134, 14 N. W. 587; 2 Notes on Minn. Rep. 367; G. S. 1913, §§ 5938-5939. Parol evidence that the parties intended the draft as against a particular fund was held inadmissible in Lewis v. Traders Bank, supra.

The case of Hove v. Stanhope State Bank, 138 Iowa, 39, 115 N. W. 476, cited by counsel for intervener, is not in point. In that case the bank was cognizant of all the facts, and actively joined one of the claimants in an attempt to protect his rights. In the case at bar Percy Vittum & Company, garnishee, knew nothing of the draft until after the service of the garnishee summons, and the rule applied in Lewis v. Traders Bank, supra, controls.

Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265, is

not in point. There was in that case an express assignment of a specific fund, a fact not here present.

In view of the facts stated it cannot well be held that there was an implied acceptance of the draft by the act of Percy Vittum & Company in receiving and selling the cattle. They had no notice of the draft, and had the right to act as though none had been issued. Nor, as heretofore stated, have the former transactions between the parties any pertinent relation to this one. The former letter of credit required all drafts to be accompanied by the bill of lading of the particular shipment drawn against. That was not done here, nor on all of the prior shipments. But no reliance was had upon the former practice. Here intervener made independent inquiry whether the Stock Yards Bank would honor the particular draft; the response thereto being the counter inquiry from the bank for information as to the number of cattle and time of proposed shipping. To this intervener paid no attention.

This covers the case and all that need be said in disposing of the appeal. The findings of the trial court are sustained by the evidence, and the record presents no reversible error.

Order affirmed.

EMIL SPIERING, AS ADMINISTRATOR OF THE ESTATE OF ORVILLE SPIERING, DECEASED, AND OTHERS v. CITY OF HUTCHINSON AND ANOTHER. CITY OF HUTCHINSON, APPELLANT.[1]

November 18, 1921.

No. 22,446.

Municipal corporation — injury to child — negligence.

A heavy plank was removed from a defective culvert and laid in the bottom of a ditch at the side of a street by property owners. A child playing in the street lifted one end of the plank and let it fall in such

[1]Reported in 185 N. W. 375.

a manner that a nail in the plank pierced his foot. *Held* that the city was not chargeable with negligence in failing to foresee and guard against such an unlikely occurrence.

Action in the district court for McLeod county to recover $7,600.85 for the death of plaintiff's intestate. The case was tried before Tifft, J., who when plaintiff rested denied defendants' motions to dismiss the action, and at the close of the testimony defendants' separate motions for directed verdicts, and a jury which returned a verdict for $1,146 against the city of Hutchinson. The motion of defendant city for judgment notwithstanding the verdict, was denied. From the judgment entered pursuant to the verdict, the city of Hutchinson appealed. Reversed.

Sam G. Anderson, for appellant.

T. O. Streissguth and *Mueller & Streissguth,* for respondent.

TAYLOR, C.

Plaintiff recovered a verdict against defendant city on the ground that the death of plaintiff's minor child resulted from the negligence of the city. The city made a motion for judgment notwithstanding the verdict, and thereafter appealed from the judgment entered on the verdict.

The facts are undisputed. To afford access to an alley from a street in the residence part of the city, a wooden culvert had been constructed across the ditch which served as a gutter at the side of the street. This culvert decayed and caved in in such a manner that one of the planks obstructed the entrance to the alley. On April 10, 1920, defendant Schramm and other residents of the block removed this plank from the entrance to the alley and placed it in the ditch at one side of the alley. Several nails protruded through the plank, and it was laid flat on the ground in such a manner that the points of the nails were forced into the soil. On May 22, 1920, plaintiff's little boy, Orville, six years of age, and another little boy about the same age, were playing in the vicinity of this plank, and Orville lifted up one end of the plank and then dropped it. As the plank fell back a nail in that end of it struck and penetrated Orville's foot. Lockjaw set in and resulted in his death.

The jury returned a verdict in favor of defendant Schramm, but against defendant city.

Assuming that the city knew, or from the lapse of time ought to have known, that the plank was lying in the bottom of this ditch or gutter, was the accident one which the city, in the exercise of ordinary care, ought to have anticipated and guarded against? Plaintiff relies largely on Rothenberger v. Powers F. F. & T. Co. 148 Minn. 209, 181 N. W. 641, and Zuponcic v. Val Blatz Brewing Co. 131 Minn. 112, 154 N. W. 790. Both these cases are distinguishable from the present case on the facts. In the Rothenberger case a skid weighing some 500 pounds was left in an alley leaning against a building in such an unstable manner that the weight of the child, when he attempted to walk along the projecting runner or timber, toppled it over upon him. In the Zuponcic case the delivery wagon was backed against the curb. The tailboard was let down and rested on a box on the sidewalk. A half-barrel of beer was left standing partly on the tailboard and partly on the floor of the wagon, while the driver went inside the building. A small boy remained on the seat in the wagon, and the driver knew that other children were on the sidewalk. As one of them was attempting to get into the wagon from the sidewalk, the horse started up pulling the tailboard off the box which supported it and the half-barrel of beer fell on the child. In both these cases the court held that whether it was negligence to leave these articles in such an unsafe position in a public highway where children had the right to be, and were accustomed to play, was a question for the jury.

In the present case the plank was not in the traveled part of the way, but lying flat in the bottom of the ditch at the side of the way. The points of the nails protruded from the bottom side of the plank and were imbedded in the soil underneath the plank. No danger was to be apprehended from the plank while it remained in this position. It was 10 feet long, 12 inches wide, two inches thick and very heavy. The city was required to exercise ordinary care to keep its streets reasonably safe for public use, but was not required to anticipate and guard against improbable dangers. That any one would attempt to handle or move this plank and be injured while doing so, was so improbable that we

think the city cannot be charged with negligence for failing to anticipate and guard against such an unlikely occurrence. Boyd v. City of Duluth, 126 Minn. 33, 147 N. W. 710, and cases there cited. In reaching this conclusion we have not considered the inconsistency of the verdict in holding the city liable while exculpating defendant Schramm who placed the plank in the ditch.

The judgment is reversed and judgment directed for defendant city.

DELIA ZIEBARTH AND OTHERS v. C. R. DONALDSON AND OTHERS.[1]

November 18, 1921.

No. 22,463.

Descent and distribution — sale to one heir at appraised value — constructive fraud.

1. Philip Plaisance, Sr., died intestate seized of a large quantity of real estate and left as his heirs at law his widow and 19 children and grandchildren. The value of the several parcels was appraised by appraisers appointed by the probate court. Thereafter at a conference between a majority in interest of the heirs, it was decided to appoint an attorney in fact to make sales and execute contracts and conveyances, and those present also agreed unanimously that an heir should have the right to buy any parcel at its appraised value. A power of attorney was executed by all the heirs, except three grandchildren who were minors, and whose rights are not involved in this action. Thereafter the attorney in fact sold a parcel of the land to an heir at its appraised value. *Held*, that this sale did not operate as a constructive fraud upon those heirs who had not been informed of the understanding that an heir should be allowed to buy at the appraised value, as it appears that both the attorney in fact and the purchaser acted in good faith and that the sale was for the fair value of the land.

Tenants in common — purchase by one from another.

2. One cotenant may purchase the interest of other cotenants and in such transactions they deal as adverse parties.

[1]Reported in 185 N. W. 377.

Exclusion of evidence proper — value of improvements.

3. Where the evidence of value fixed the value as enhanced by improvements, the court properly excluded evidence of the cost of such improvements.

Action in the district court for McLeod county to set aside a contarct. The case was tried before Daly, J., who made findings and ordered judgment in favor of defendants. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

C. J. Cahaley, C. P. Kleinmann and *A. D. Smith,* for appellants.

M. C. Tifft, for respondents.

TAYLOR, C.

Philip Plaisance, Sr., died intestate in Hennepin county, February 26, 1915, seized of a large amount of real estate in the states of Minnesota and North Dakota. He left surviving him as his heirs at law his widow, ten living children and nine grandchildren who were the children of a deceased son. In April, 1915, C. R. Donaldson was duly appointed administrator of the estate, and in July, 1915, appraisers appointed by the probate court duly appraised the value of the several parcels of real estate and reported their appraisal to the court. The heirs were scattered. In October, 1915, the widow and six of the children met with the administrator and his attorney to discuss the matter of closing up the estate and selling the lands. The heirs present at this meeting decided that the fact that the heirs were scattered in different places and in different states made it advisable to appoint an attorney in fact with power to make sales and execute contracts and deeds, and then selected Mr. Donaldson, the administrator, as the person to whom such power should be given.

At this meeting, the inventory and appraisal of the real estate was examined and considered, and the suggestion that an heir should be allowed to buy any parcel at its appraised value was agreed to by the widow and the six children present. They owned, between them, 69/99 of the property. Thereafter a power of attorney was executed to Mr. Donaldson by all the heirs except three grandchildren who were minors. These three minors require no further mention, for they are not parties

to this action, and their interest in the property has not been affected by any of the proceedings involved herein. After the execution of the power of attorney, and on January 11, 1916, Donaldson, in the name of the donors of the power, contracted in writing to sell and convey to defendant Philip Plaisance, Jr., the undivided 91/99 of a parcel of 320 acres in McLeod county for 91/99 of its appraised value. Philip had resided upon and farmed this land for several years during his father's lifetime, and had continued to reside upon and farm it after his father's death. The contract provided for the conveyance to him of the interest of all the other heirs except the three minors. Donaldson also sold other parcels to other heirs at the appraised value.

Four of the children of Philip Plaisance, Sr., and the six grandchildren who executed the power of attorney joined as plaintiffs in bringing this action to cancel the contract made by Donaldson with Philip Plaisance, Jr. The widow and five of the children did not join as plaintiffs and are not parties to the action. The trial court made findings of fact and conclusions of law and directed judgment for the defendants. Plaintiffs appealed from an order denying a new trial.

The plaintiffs contend, in substance, that the sale to Philip was for an inadequate price; that they had no knowledge of the appraised value of the lands nor of the understanding that an heir was to be allowed to purchase at such appraised value; and that making the sale to Philip at the appraised value, without informing them of the amount at which the land had been appraised or that it would be sold to an heir at the appraised value, operated as a constructive fraud upon them. They do not impugn the good faith of either Donaldson or Philip.

The eighth finding of fact is:

"That in executing and delivering the power of attorney herein, all the parties acted in absolute good faith and with full knowledge of the contents thereof and the power conferred upon said C. R. Donaldson thereby."

The ninth finding of fact is:

"That in making the sale and entering into the contract for sale with Philip Plaisance, Jr., the said C. R. Donaldson acted in good faith, and that the price obtained and named in said contract was a fair price for

the property therein described, and was the reasonable value thereof at the time such sale was made."

That under the power of attorney Donaldson had power to make the contract which he did make is not questioned, and that he acted in entire good faith is found as a fact by the court and is not disputed. No actual fraud is claimed on the part of either Donaldson or Philip—merely that the failure to inform plaintiffs of the appraised value and that sales would be made to heirs at that price, operated as a constructive fraud. The plaintiff Denise Ziebarth was present at the meeting in October, 1915, and had full knowledge of the action taken at that time. The plaintiff Maud Steen purchased a parcel of the land, located in Stearns county, at its appraised value shortly after the sale in controversy. The fact that these two plaintiffs may not be in position to question the sale to Philip would not debar the other plaintiffs from attacking it, if they had any just ground for doing so.

While the evidence as to value is conflicting, as might be expected after a lapse of more than four years and a marked increase in land values, we think it is sufficient to sustain the finding that the sale was at a fair price and for the reasonable value of the land at that time.

Plaintiffs insist that the fact that they were cotenants with Philip created a confidential relationship between them, which Philip violated in making this purchase. In support of this contention, they cite statements found in decisions applying the long-established rule that one cotenant cannot acquire an incumbrance upon the common property or an outstanding adverse claim of title and enforce the same against his cotenants for his own benefit, but must permit them to share in the benefits of such a transaction on contributing their proportionate part of the expense which he incurred. But this rule in no manner restricts the right of cotenants to buy from, or sell to, each other. Schmidt v. Constans, 82 Minn. 347, 85 N. W. 173, 83 Am. St. 437; Freeman, Cotenancy, §§ 164, 165; 7 R. C. L. 825. And in such transactions they deal as adverse parties.

Plaintiffs claim that the power of attorney was given with the understanding that no sales would be made by Donaldson until the price

and terms had been submitted to and approved by the plaintiffs. But this claim was denied and is eliminated by the findings.

We fail to find any ground for applying the doctrine of constructive fraud to the facts of this case. The cases cited by plaintiffs involved situations radically different from that here presented, and are not in point. Here Donaldson was authorized to make the sale on behalf of plaintiffs, the price was the fair value of the land, and the parties acted in entire good faith.

Plaintiffs also insist that the court erred in excluding evidence to show that Philip had constructed buildings on the land during his father's lifetime, and had presented a claim therefor against the estate which had been allowed and paid. The evidence as to the value of the property fixed its value as enhanced by these improvements, and we fail to see wherein the court erred in this ruling.

Order affirmed.

DANIEL F. FOLEY AND MARY GLEESON FOLEY v. FRANK P. PILCHER AND HILMA HOLM.[1]

November 18, 1921.

No. 22,496.

Vendor and purchaser — completion of house in workmanlike manner.

1. A contract of a vendor to "complete as agreed" a house under construction on the premises sold, *held* to contemplate completion of the house in a workmanlike manner, notwithstanding the fact that a separate memorandum was made as to some things that were to be done.

Same — reconstruction of defective roof.

2. If the roof and basement floor were wholly worthless, the contract contemplated new construction.

Parol evidence admissible to explain ambiguous memorandum.

3. The contention of both parties as to one item departed from the terms of the memorandum. The memorandum was ambiguous. The court properly received the oral testimony of plaintiffs on this point.

[1]Reported in 185 N. W. 652.

Action in the municipal court of Minneapolis to recover $950 for breach of contract. The answer alleged that defendants had fully complied with all the terms and conditions of the contract on their part, and that the house had been finished in a good and workmanlike manner. The case was tried before Baldwin, J., and a jury which returned a verdict for $400. From an order denying their motion for a new trial, defendants appealed. Affirmed.

Walter S. Whiton, for appellants.

Daniel F. Foley, for respondent.

HALLAM, J.

This is an action by plaintiffs to recover damages for breach of contract. Defendant Holm owned a dwelling house in process of construction. Through defendant Pilcher she negotiated a sale to plaintiff. The contract of sale contained this language: "The lot to be graded and front seeded to grass, and the house completed as agreed except as to the papering or decorating, and the gas and electric fixtures and the second floor. Nothing to be done or finished on the second floor in any manner." At or about the same time a memorandum was made of certain things which were to be done. The memorandum was not signed. Defendant Pilcher, in his testimony says with reference to it, "that was a memorandum Mr. Foley wrote up himself to joggle our memory in regard to a few things." Among the items mentioned are "basement to be finished" and "front to be brick veneered." The signed contract makes no reference to this memorandum but plaintiff Daniel Foley testified that it should be properly a part of the preliminary contract. Plaintiff's claim of damage refers in part to failure to complete some of the items mentioned in the memorandum and in part to failure in other respects to complete the building in a workmanlike manner. The jury found a verdict for plaintiff in the sum of $400. Defendant appeals.

No question is made that both defendants are bound by the contract and we do not discuss that question.

Defendants contend that the court erred in admitting evidence of the faulty construction of the house as to matters not included in the mem-

orandum. We are of the opinion that this contention is not well taken. The whole transaction was very informal, but we are disposed to construe the contract as a contract not only to do the specific things mentiond in the memorandum, but otherwise to complete the building in a workmanlike manner. The record shows that the building was far from completion at the time the contract was made. We think it clear that defendants would not have been justified in leaving it in its then unfinished condition. It would appear that the parties themselves gave to the contract this practical construction and that defendants did continue the completion of the house after the contract was made.

2. The items of damage include $88 for a new roof and $97 for a new floor in the basement. Defendants contend that these items of damage should not be allowed. The contention is that the roof and basement floor at most needed only alteration. The evidence on the part of plaintiffs is that both roof and basement floor were wholly worthless. As to the roof their testimony is that it was made of a composition that was wholly unserviceable. The contract contemplated a serviceable roof and basement floor and if they required new construction, then new construction was in contemplation of the contract.

3. As above stated the memorandum contained the item "front to be brick veneered" without further specification. Defendants contend that the agreement was that the front was to be brick veneered only to the top of the foundation. Plaintiffs contend that the agreement was that the brick veneer should go up to the windows on the first floor. The jury evidently accepted plaintiffs' version. If we are to be bound by the literal terms of the memorandum, it would seem that the whole front should be brick veneered. This is more than even plaintiffs contend for. The contention of both parties varies the terms of the memorandum. The memorandum was vague and ambiguous. We think the court properly received the testimony of the plaintiffs as to their version of the understanding, and that the jury was justified in accepting the testimony of plaintiff.

There was evidence from which the jury might find damages in the amount awarded.

Order affirmed.

FARMERS & MERCHANTS STATE BANK v. FRANK GRAIF, SR.[1]

November 18, 1921.

No. 22,509.

Note of unlicened foreign corporation enforceable by whom.

1. A note by a foreign corporation, not licensed to do business in Minnesota, given in the course of business done here, is enforceable in the hands of a bona fide purchaser.

Same — negotiation of note in payment for stock not a fraud.

2. The evidence does not show that a note given to a corporation in payment of its stock, where there was an accompanying agreement that the stock would go to par within a year, contemplated that it should not be negotiated, and that its negotiation was a fraud within the Negotiable Instruments Act and cast upon a purchaser the burden of proving good faith.

Finding supported by evidence.

3. The finding of the trial court that the plaintiff was a bona fide purchaser is sustained by the evidence.

Action in the district court for Mower county to recover $1,000 upon a promissory note. The case was tried before Childress, J., who made findings and ordered judgment for $1,200. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Moonan & Moonan, for appellant.

Sasse & French, for respondent.

DIBELL, J.

Action to recover upon a promissory note made by the defendant Graif to the United States Rural Credit Association, a South Dakota corporation, and indorsed to the plaintiff. The trial court found for the plaintiff. The defendant appeals from an order denying his motion for

[1]Reported in 185 N. W. 374.

a new trial. The controlling question is whether the plaintiff was a bona fide purchaser.

1. The note was dated March 2, 1917, was due in one year and was given in payment of 20 shares of stock of the association of the par value of $100 each. It was purchased by the plaintiff before maturity. The association was not licensed to do business in Minnesota as provided by G. S. 1913, §§ 6206-6208. The note was enforceable in the hands of an innocent purchaser though the association was not licensed. Finseth v. Scherer, 138 Minn. 355, 165 N. W. 124.

2. The agent making the sale agreed in the name of the association as follows:

"This is to certify that the United States Rural Credit Association agrees to refund to Mr. Frank Graif, Sr., $1,000.00 note (which he gave for twenty shares of their stock) if the stock does not go to the value of $100.00 a share by March 1st, 1918."

The evidence shows that what the defendant wanted was a guaranty that the stock would go to par within a year and that the agreement was for that purpose. The association did not agree not to negotiate the note. Its negotiation was not a fraud within the Negotiable Instruments Act. G. S. 1913, § 5867. See McWethy v. Norby, 143 Minn. 386, 173 N. W. 803; Wade v. National Bank of Commerce, 144 Minn. 187, 174 N. W. 889; Farmers State Bank v. Skellet, 149 Minn. 266, 183 N. W. 831. Of course if the plaintiff knew of the agreement it was not a bona fide purchaser and cannot recover. Whether there was fraud in negotiating the note is important only because fraud puts the burden of proof of good faith upon the purchaser. G. S. 1913, § 5871.

3. The trial court found that the plaintiff was a good faith purchaser. The association was a customer of the bank and kept an account with it. The bank knew that it was selling its stock. It took notes from it as collateral and in a few instances bought. There are some circumstances disclosed by the evidence from which arguments can be made that the bank was charged with notice of the defenses claimed. When made they are arguments upon questions of fact. The most that can be said, favorable to the defendant, is that a finding contrary to that made would be sustained. That made is sustained.

The case was vigorously contested. We have considered all the ques-

tions raised and find it unnecessary to remark upon other features of the case.

Order affirmed.

On December 16, 1921, the following opinion was filed:

ON MOTION FOR REARGUMENT.

PER CURIAM.

The defendant asks for a reargument principally upon the ground that the decision is in conflict with Wade v. National Bank of Commerce of Mankato, 144 Minn. 187, 174 N. W. 889, cited in the opinion, along with other cases, as an illustration of the negotiation of a note contrary to agreement and so in fraud. G. S. 1913, § 5867. In that case a writing signed by the payee, an insurance agent, who had taken a note for an insurance premium, contained the statement that in the event that the maker secured more satisfactory insurance within 60 days "the premium * * * will be returned to you without reservation." The testimony was that the payee said "that that note wouldn't go any farther than him until the sixty days was up; it wouldn't be used in any way." The court treated the case as one of conditional delivery.

In the case at bar what the defendant wanted was assurance of safety. He used the word "guarantee." The defendant was not unfamiliar with corporate stock. He did not buy in ignorance. He must have known that stock is sold to get money. He exacted what he thought would make him safe. If the association were responsible he would be safe. He took the stock. He could sell it. We are unable to believe that it was the thought of either the defendant or the corporation that the note should not be negotiated, and we take it that the trial court's view is in accord. The agreement served a purpose and was binding, but it was not an agreement not to negotiate the note. The Wade case was in mind when the opinion was written. We thought it not at all controlling. As stated in the opinion, the question whether the note was negotiated in fraud of an agreement is only important upon the question of the burden of proof, but, if the burden of proof were upon the plaintiff, it may be that some questions not discussed in the opinion would be material. The motion for a reargument is denied.

M. C. O'DONNELL v. S. P. LESSELYOUNG.[1]

November 18, 1921.

No. 22,576.

What is in issue on motion to strike out answer as sham.

On a motion to strike out an answer as sham, the court does not try the issue made by the pleadings, but determines whether there is a real issue to try. *Held*, under the facts recited in the opinion, that it was error to strike out the answer as sham.

Action in the municipal court of Minneapolis to recoveer $75 on a promissory note. From an order, Baldwin, J., granting plaintiff's motion to strike out the answer as sham and frivolous, and to allow plaintiff to enter judgment against defendant, defendant appealed. Reversed.

W. H. McDonald and *Howard Costello*, for appellant.

M. C. O'Donnell, for respondent.

DIBELL, J.

Action on a promissory note made by the defendant to one Clark and alleged to have been indorsed to the plaintiff for value before maturity. The defendant appeals from an order striking out his answer as sham.

The answer contains a general denial. It admits the making of the note. It alleges a defense good against Clark. It cannot be urged seriously that the answer, so far as it alleges a defense good against Clark, is sham. The general denial puts in issue the transfer to the plaintiff, and it specifically alleges that the plaintiff is not the owner of the note, but that Clark is. The real controversy on the motion is over the transfer to the plaintiff as a bona fide holder.

The affidavits of Clark and of the plaintiff state that the note was indorsed by the plaintiff in part payment of his services as attorney

[1]Reported in 185 N W. 289.

for Clark in an action in the Federal court, and both say that the defendant, after the note became due, promised to pay the plaintiff. The defendant in his affidavit says that Clark called at his office after the maturity of the note in reference to its collection; that he stated that he had not transferred it to the plaintiff in payment of services; that the plaintiff was not his attorney in the Federal court, and that he had left the note with him for collection. The defendant is in part corroborated by the affidavit of one Sheehan. He fails to deny the promise to pay the plaintiff.

If cases were tried on affidavits, and reviewed on appeal as now, we would sustain a finding for the plaintiff, or trying the case ourselves on affidavits we might find for him. On a motion to strike out as sham, it is for the court to determine whether there is an issue to try, not to try the issue. 2 Dunnell, Minn. Dig. § 7657, et seq. The affidavits do not clearly show that the answer is false. The defendant is entitled to a trial in the ordinary way.

The motion was made on the additional ground that the answer is frivolous. It is clearly not so and we do not understand that the plaintiff seriously contends that it is.

Order reversed.

HANS RASMUSSEN, AS GUARDIAN FOR MATHEW LEHMAN v. F. J. EVANS, PROPONENT OF THE WILL OF KATIE HOGSTADT, DECEASED.[1]

November 25, 1921.

No. 22,241.

Will — definitions of undue influence and mental capacity — burden of proof.

1. To constitute undue influence such as to avoid a will the testator must be so controlled or affected by persuasion or pressure that he does not understandingly and voluntarily make a will, and the burden of

[1]Reported in 185 N W. 297.

proof of undue influence is upon the contestant. To constitute mental capacity to make a will, the testator must have such mental ability as to comprehend his relations to others having claims upon his bounty, the nature and extent of his property, and the effect of his will upon it, and the burden of proving such mental capacity is upon the proponent.

Findings supported by evidence.

2. Applying these tests, the evidence sustains the trial court's finding that the will involved was not executed through undue influence, and that the testatrix was of sufficient capacity to make it.

F. J. Evans petitioned the probate court for Otter Tail county to admit to probate the last will and testament of Katie Hogstadt, deceased. Mathew Lehman, her father and heir at law, filed objections to the probate of the will. The objections were overruled, and contestant appealed to the district court for that county. The appeal was heard by Parsons, J., who made findings and affirmed the order of the probate court admitting the will. From an order denying his motion for a new trial, Mathew Lehman appealed. Affirmed.

James A. Brown, Anton Thompson and *F. A. Ontjes,* for appellant.

N. F. Field and *M. J. Daly,* for respondent.

DIBELL, J.

This is an appeal by the guardian of Mathew Lehman, the father and sole heir and one of the beneficiaries under the will of Katie Hogstadt, deceased, from an order of the district court of Otter Tail county denying a new trial. The trial resulted in findings sustaining the will and affirming the order of the probate court. The court found that there was no undue influence and that the testatrix had sufficient mental capacity. The only questions are whether the evidence sustains these findings.

1. To constitute undue influence the mind of the testator must be so controlled or affected by persuasion or pressure that he does not act understandingly and voluntarily, but is subject to the direction of another, to whose purpose his will gives expression, and the burden of proof is upon the contestant. Mitchell v. Mitchell, 43 Minn. 73, 44 N. W. 885; Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598; Buck v.

Buck, 122 Minn. 463, 142 N. W. 729, and cases cited. The term in a way defines itself. Legitimate argument or persuasion is not condemned. Usually the question whether undue influence has been exercised is one of fact for the trial court. The appellate court, under our practice, inquires only as to the sufficiency of the evidence to sustain the conclusion reached.

If the testator has the mental ability to comprehend his relations to others having claims upon his bounty, the nature and extent of his property, and the effect of his will upon it, he has the required mental capacity. Buck v. Buck, 126 Minn. 275, 148 N. W. 117, and cases cited. Schleiderer v. Gergen, 129 Minn. 248, 152 N. W. 541; Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131. The burden of proof of the fact of mental capacity is upon the proponent. In re Layman's Will, 40 Minn. 371, 42 N. W. 286; Kennedy v. Kelly, 123 Minn. 259, 143 N. W. 726. If the testator responds to the tests stated it is enough, though he is mentally or physically weak or in ill health, and though he is not able to carry on complicated business negotiations, or protect imself in a business controversy with others. It has been said that less than contractual capacity suffices. Like the question of undue influence, the question of mental capacity is usually one of fact, of which the supreme court has only the limited review stated.

2. The claim of undue influence gave the trial court no trouble. There is no difficulty with it here.

The contestant's claim is that Elof Swenson, a half nephew of the testator's deceased husband and the husband of her half sister, unduly influenced the making of the will. He had the opportunity, for the decedent lived with him. He had an interest, for he would take nothing by descent. Her father was the sole heir. The court found some circumstances unfavorable to Swenson, some mercenary motives, and some acts which were subject to criticism, but saw no justification for a finding that he exercised undue influence. Its finding that there was no undue influence is well sustained.

With the question of the mental capacity of the decedent, the trial court had more difficulty. The testatrix was born in Germany. She came to this country when about 19 years of age. Her father, who had

emigrated a few years before, then lived at Mason City, Iowa. She worked out for a while, but soon married. She and her husband lived in South Dakota and accumulated land. Her husband died in 1910. Swenson was a native of Sweden and came to this country in 1907, when 16 years of age, to live with the testatrix and her husband. They had no children. He was a member of the family and was treated somewhat like a son. He married Mrs. Hogstadt's half sister.

The decedent worked hard pioneering with her husband, and at 54 years of age was broken in body. For several years she had been poorly. She had a stroke of paralysis in the latter part of 1917, and a second and severe stroke on November 4, 1918. The will was made on November 14, 1918. She died on November 25, 1918. Her death was expected.

The subscribing witnesses of the will were of the opinion that she had sufficient mental capacity. So was the lawyer who drew it and was present at the execution. There were many other witnesses of like opinion. Her will remembered her blood relatives. She gave $4,000 to her father. To ten other relatives she gave a total of $17,000, ranging in amounts from $1,000 to $4,000. She made other relatives her residuary legatees. She gave Swenson the interest coming from land contracts amounting to $26,500, bearing interest at 5½ per cent, and due on or before March 1, 1932. This was substantially all her property. It was the request of the testatrix, not made binding upon the executor, that until the money was realized on the farm land contract there should be no distribution. The bequest to Swenson was not such as to suggest lack of capacity. He had been with her long. They had disagreed and quarreled, but he had her affection. She seems to have had in mind her property, and those having natural claims upon her bounty.

The distribution of her property was not complicated. The will, however, was worked out in great detail and with exactness and considerable circumstance. It required some concentration of mind to appreciate all its bearings. The testimony is ample that it was explained to her, item by item, and that she seemed to understand it. The testimony is that she corrected a mistake as to the amount coming from her

village property in South Dakota, and that she chose her executor without suggestion.

The record is a long one. It is not practicable nor would it be profitable to review the evidence in detail. The trial court gave it studious consideration. We have gone over it carefully, having in mind that it is our function to determine whether it sustains the finding, not to make one. It is not necessary to place an affirmance upon the ground that the finding is not manifestly against the evidence, although that would be sufficient. It is right to say that it is well supported by the evidence. This is not saying that a contrary finding would not be upheld. But the finding, so far as we can get the effect of the evidence from a position not so favorable as that of the trial court, was the proper one.

Order affirmed.

JOHN HANEY v. C. F. FERCH AND OTHERS.[1]

November 25, 1921.

No. 22,355.

Drain — action against subcontractor for breach of contract — verdict.

Plaintiff, to whom a county had let the construction of a ditch, sublet a part thereof to defendants under a contract in which they agreed to give a bond to secure performance. A bond was subsequently given running to plaintiff and the county. In this action to recover the cost to plaintiff of completing that part of the contract which defendants failed to complete, it is *held*:

(1) The ditch having been completed by plaintiff as per his contract with the county, the county was not a necessary party to this action on the subcontract and bond.

(2) Evidence of what it cost plaintiff to complete the ditch was properly received, the measure of the recovery being the reasonable cost of doing what defendants left undone.

(3) The evidence sustained the finding of the jury that plaintiff did not wrongfully interfere with defendant's work.

(4) There was no error in excluding a document intended for a contract between the parties, but which had never been executed by plaintiff,

[1]Reported in 185 N. W. 397.

particularly since the answer did not plead such document as having been made. The recital in the bond, that it was to secure a contract of even date, becomes immaterial, because of the admission of the answer that the parties operated under the contract attached to the complaint, until an alleged verbal agreement was made more than a year after the execution of the bond.

(5) The motion as well as the appeal being joint, the surety cannot take an advantage of the recitals in the bond, since the other defendants are, in any event, liable, under the finding of the jury, on the contract attached to the complaint.

(6) The defendants were not entitled to a directed verdict.

(7) Statements by an attorney borne out by the record cannot be considered prejudicial.

(8) The amount of the verdict is sustained by the evidence.

Action in the district court for Big Stone county to recover $16,000 for breach of contract. The substance of the answer will be found in the second paragraph of the opinion. The case was tried before Flaherty, J., and a jury which returned a verdict for $6,000. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

A. W. Ewing, A. B. Kaercher and *K. T. Dahlen,* for appellants.

Cliff & Purcell, for respondent.

HOLT, J.

In February, 1915, the county of Lac qui Parle let to plaintiff the construction of county ditch 41, to be completed before October 15 of that year. Plaintiff moved a dredge to the place, but did not start the work. In August he sublet the excavation part to defendants, retaining the cement work for the bridges and dams. At that time, the time for completion was extended by the auditor to July 1, 1916. Defendants, with a "dry land digger," excavated about 4,000 feet of the ditch before freezing put a stop to the work. In the spring and early summer of 1916, floods in the valley of the Minnesota river, the location of the ditch, made it impossible to prosecute the work to advantage, and on July 31, 1916, the auditor undertook to again extend the time of completion, the time named being January 1, 1917. Defendants excavated

for a distance of 600 feet before it froze up in the fall of 1916. The petitioners for the ditch and the county board were dissatisfied with the progress made, and one Gunyon was induced to undertake part of the work, plaintiff letting him use his floating dredge and defendants directing the county to pay Gunyon a certain amount for the yardage excavated by him. Gunyon, however, abandoned the work in August, 1917. Then defendants and also plaintiff did some. In the spring of 1918, floods again interrupted, but some work was done by both parties. Defendants quit the dredging in July of that year. The ditch was finished by plaintiff in 1919 to the satisfaction of the engineer, but it was not accepted by the county board until in April, 1920, after this suit was brought.

Plaintiff sues defendants for breach of the contract and bond given to secure its performance, claiming damages in the sum of $16,000, the alleged cost of completing the work that defendants failed to do. The demurrer to the complaint being overruled, defendants answered, alleging wrongful interference by plaintiff in damming the river and entering upon the work himself without right, and also set up an alleged agreement, under which it was claimed that each party was to hasten the completion of the enterprise, and receive a pro rata share out of the sum the county was to pay for excavating the ditch. The jury returned a verdict of $6,000 for plaintiff. He had previously received some $2,600 for excavating. Defendants appeal from the order denying their motion in the alternative for judgment or a new trial.

It is contended that the demurrer to the complaint should have been sustained on the ground that the county was a necessary party. The argument is that the bond given by defendants to secure the performance of their subcontract runs to the county as well as to plaintiff. But, even so, it appears that the work was completed, hence the county has no claim under the bond, and it does not appear that any one else, other than plaintiff, has. The county is not concerned in the dispute between plaintiff and defendants. Under the written order executed by plaintiff, the county is required to pay the money to become due for excavating to defendants. Defendants also in their answer averred the county to be a necessary party, and asked for a dismissal, because it had not been

made such. But at the trial it appeared that the county had formally accepted the ditch. That being so, and there being no intimation of any claim in favor of the county on account of the subcontractor's bond, we think the county cannot be a necessary party to this action.

Evidence of the cost to plaintiff of the different items going into the work he did, was received over defendant's objection. The ruling was right.

Plaintiff proceeded on the theory that he was bound under his contract with the county to step in and do the work, when it was apparent that defendants neglected to do it seasonably and properly. If he was right in this, and the jury so found, then defendants are chargeable with the reasonable cost of the part left undone by them and finished by plaintiff. Had the cost been less than the reasonable value, defendants would have been entitled to the benefit. In other words, plaintiff could not recover the reasonable value if it actually cost him less. Of course, it is also true that the cost to him does not necessarily measure the damages recoverable, for plaintiff could not incur needless expense. He was bound to use proper means and methods to do it efficiently and economically, but if he so did, the reasonable cost would be his damages. Ordinarily, the reasonable cost would be the reasonable value. Plaintiff also undertook to prove that the reasonable value was what it cost him to complete the job. Whether plaintiff used efficient means and methods in the work was for the jury. The law is well settled, that a person who abandons the work he has contracted to do, before it is completed, must pay the other party to the contract the reasonable cost of finishing it according to the agreement. Paine v. Sherwood, 21 Minn. 225; City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368. It was, perhaps, not necessary for plaintiff to produce evidence of the reasonable value of his work, but it was not improper, for, evidently, defendants were claiming the expense or cost incurred by plaintiff to be unreasonably high.

Complaint is also made of the admission of testimony that plaintiff had made unsuccessful efforts to get others to do the work. This evidence may not have much bearing, but it, as well as the testimony of the engineer as to the reasonable value of doing the work at the time it

was done, tended to furnish a reason why the cost to plaintiff came so high compared with the price at which the excavation was let to defendants in 1915. It was also proper to prove by the engineer, who showed himself competent to testify on the subject, to what extent the cost or reasonable value of ditching increased during the time the work was in progress.

A contention is made that plaintiff wrongfully moved his dredge on the job and began work in the fall of 1916, because there had been an extension of time granted defendants until January, 1917. But the answer is that the auditor had no authority to grant the extension. At least, no provision of law has been referred to under which the auditor is given this power, and we have found none. The petitioners and engineer could therefore ignore the extension and insist, as was done, that plaintiff take steps to finish the job. There clearly was default when plaintiff took hold in 1916. The bond sued on, given to secure the subcontract to defendants, so recites.

Four assignments of error relate to an effort to introduce a document, Exhibit 7, not signed by plaintiff, as the one substituted for the contract made the foundation of the suit, attached to the complaint as Exhibit A, and being the contract executed when the excavating was sublet to defendants in 1915. This contract provided for the giving of a bond by defendants in the sum of $7,500. Such a bond was executed March 6, 1916. However, in the bond, also attached to the complaint as Exhibit B, it is recited that a new contract had been entered between the parties as of that date. There was no proof or offer of proof of any contract of that date other than the said document, Exhibit 7, not signed by plaintiff. Plaintiff was designated as one of the parties to it. It surely cannot be held his contract until signed by him. The defendant, Mrs. Ferch, the surety in the bond could, perhaps, have escaped liability on the bond, but for the fact that she joined in the answer wherein the execution of the bond and the contract A is admitted, and it is alleged that the work proceeded under the latter until the spring of 1917, when an agreement was made between the parties modifying contract A, under the terms of which both parties should take hold of and finish the work, and prorate the price the county was to pay under its

contract with plaintiff for the excavating. The motion for judgment or a new trial, as well as the appeal from the order denying it, is joint and not several. It is plain that Mrs. Ferch cannot gain any advantage by this appeal, unless the other defendants are also entitled thereto. We think they are not, for, as far as the pleadings and proof went, the only contract, other than Exhibit A, which they could claim a defense under, was the one of the spring of 1917. And whether this was made was submitted to the jury and determined against defendants upon conflicting testimony. The defendants, other than Mrs. Ferch, were bound by their contract, Exhibit A, even though the obligations of the bond did not become effective.

We do not think defendants were entitled to a directed verdict or judgment notwithstanding the verdict, for, as already indicated, on the main defense of a substituted agreement in the spring of 1917, plaintiff vigorously denied the making thereof, and, on the other, that plaintiff entered the work defendants were to do before they were in default and impeded them by damming the river, we think it is even more clear that there were disputed facts to be determined by the jury. There was from the start almost continuous dickering between the parties, both realizing that the momentous and unexpected events that followed the making of the contract in 1915 so upset the industrial and labor situation that the ditch could not be dug except at a great loss. No doubt, each side was attempting to place as much as possible thereof upon the shoulders of the other. But we do not think the record justifies a charge that either side attempted to oppress the other with unnecessary expense or loss.

No prejudice could result from the argument of plaintiff's attorney that the money in the hands of the county belonged to defendants, for the record shows it to be a fact. When the excavating was sublet to defendants, plaintiff in writing directed the county to pay them the money to become due for the yardage excavated. And, on the argument in this court, plaintiff's attorney admitted that the sum now remaining unpaid upon this ditching contract in the hands of the county belongs to defendants.

The amount of the verdict is challenged as excessive. Plaintiff's

testimony would have justified a larger amount. So that it is impossible for this court to say that there is not evidence warranting the sum awarded. The court, as well as the jury, must have hesitated long before placing any unnecessary cost upon defendants. All must have realized that they became victims of untoward circumstances. The recurring floods and the war, with the accompanying scarcity of labor and high prices, more than doubled the cost of the work. Under those conditions the jury must have been inclined to scrutinize plaintiff's evidence as to cost with care. That this was done is evidenced by the fact that the amounts testified to by plaintiff were very substantially cut down, without any evidence from defendants upon the subject of cost or reasonable value of the work performed by plaintiff, except that of one engineer giving what he considered fair prices at which the construction of this ditch could have been let during the several years here involved. It is apparent that this engineer's estimate was upon the whole job. Here defendants undertook to do it by a plan that was contended to be unworkable upon ground such as that through which the ditch went. A large part of the work done by defendants was not in accordance with the plans and specifications. This necessitated going in again with the dredge and providing water to float it by damming the Minnesota river, in order to excavate a small yardage. Because of the piecemeal way in which the construction was left by defendants, the finishing became exceedingly expensive.

We are unable to discover any error which would justify us in setting aside the verdict, approved as it is by the trial court.

Order affirmed.

NELS JACKSON AND JENNIE JACKSON v. ED. STRAABE.[1]

November 25, 1921.

No. 22,362.

Judgment based on issues litigated, not on prayer for relief.

1. In an action at issue on the pleadings and litigated by the parties, the prevailing party is entitled to judgment consistent with the issues thus presented without regard to the specific relief demanded.

[1]Reported in 185 N. W. 290.

Grant of relief beyond prayer proper, when.

2. A judgment in such an action for relief beyond that expressly demanded is not void so long as the subject matter so adjudicated was embraced within the pleadings or litigated by consent.

Otherwise in case of default judgment.

3. The rule is otherwise in default judgments where the relief of plaintiff is limited by statute to that expressly demanded in his complaint.

Judgment in ejectment in favor of plaintiff not void, when.

4. In an action in ejectment wherein plaintiff's title to the property is alleged in the complaint and for lack of denial is admitted by the answer, a judgment determining the title to be in plaintiff is consistent with the pleadings and therefore not void.

Action in ejectment in the district court for Anoka county and to recover $1,000 for withholding the premises. Defendant's motion to vacate the judgment entered on November 29, 1916, whereby plaintiffs were decreed to be the owners of the premises involved, was granted, a new trial of the action was ordered, and the case consolidated with the case of Straabe v. Jackson for trial. From the order granting that motion, plaintiffs appealed. Reversed.

Will A. Blanchard, for appellants.

Louis A. Reed, J. M. Pulliam and *L. A. A. P. & R. C. Reed,* for respondent.

BROWN, C. J.

The parties to this action entered into an executory contract for the sale to defendant of certain land owned by plaintiffs situated in Anoka county. A down payment on the purchase price was made and defendant was given possession of the land on March 15, 1914. Defendant subsequently discovered what he considered were fraudulent representations concerning the land, made by plaintiffs at the time the contract was entered into, and in April, 1915, he commenced an action in equity to rescind the contract, and recover the down payment. At that time there was an instalment of the purchase price which he failed and refused to pay. Plaintiffs answered in that action denying the fraud. Thereafter they duly gave notice of a cancelation of the contract for the

failure of defendant to make the payment so due as just stated. The notice was not complied with, that is, defendant did not make the payment, and, after the expiration of 30 days from the service of the notice, plaintiffs brought this action in ejectment to recover possession of the land. Defendant answered, and for the alleged fraud embraced in his action for a rescission of the contract, which was pleaded in the ejectment suit, demanded a rescission of the contract and judgment for the return of the down payment. Both actions came on for trial at the same time and were for the purposes of the trial consolidated and tried together, an appropriate judgment being awarded in each. An appeal resulted in a reversal in each case. Straabe v. Jackson, and Jackson v. Straabe, 134 Minn. 179, 158 N. W. 915.

This action, the ejectment suit, was promptly remanded to the court below on application of plaintiffs and was duly noticed for trial at the October, 1916, term of the court where it was pending. It came on for trial on October 11. Both parties appeared, and after some preliminary proceedings and objections, not here material, the issues were tried. At the conclusion of the trial the court directed a verdict for plaintiffs and judgment was thereafter on November 29, 1916, duly rendered to the effect that they were the owners of the land and entitled to the possession of the same. Defendant then surrendered the premises to plaintiffs, who ever since have and now do hold possession thereof. On the trial defendant moved that the action be again consolidated and tried with the action to rescind the contract, which was denied, on the ground that that action had not been remanded from this court and was still pending therein. The ruling was correct. That action was subsequently remanded to the court below. There was no appeal from the judgment rendered in this action and it became final and beyond attack, except under the mistakes and amendment statute, six months from the date of the entry, or on May 29, 1917.

Thereafter, on October 27, 1919, some two years and eleven months after the entry of the judgment, defendant made the motion involved on this appeal, to set the judgment aside and for a retrial of the action, on two grounds, stated in a word, (1) excusable neglect, and (2) that the judgment exceeded the relief demanded by the complaint and to that extent was void. The motion was granted by the trial court and plaintiffs appealed.

1. It does not expressly appear upon which of the two grounds the trial court granted the motion, but we assume that it was not upon the first, excusable neglect, for it is clear on the record that defendant is not entitled to relief on that ground. Our statutes provide that relief from judgments may be had upon a proper showing of excusable neglect at any time within one year from notice of the entry thereof. G. S. 1913, § 7786. It conclusively appears from the record that defendant had notice of this judgment immediately after its entry. The motion for relief was not made for nearly three years thereafter. Clearly it came too late.

2. The second ground of motion presents the only theory on which the trial court could grant the relief, if at all. But we are clear that the facts of the case are not sufficient to sustain it on that ground. The action is in ejectment and the specific relief demanded in the complaint is limited to a judgment for the possession of the property with costs of suit. The judgment in fact rendered determines that plaintiffs are the owners of the premises, in addition to awarding possession thereof to them. The precise point made by counsel for defendant is that the part of the judgment determining the title to the property was unauthorized and therefore void within the rule stated and applied in Sache v. Wallace, 101 Minn. 169, 112 N. W. 386, 11 L.R.A.(N.S.) 803, 118 Am. St. 612, 11 Ann. Cas. 348, because no such relief was demanded by the complaint. The case is not in point on the facts here involved. That was a default judgment, and was made to adjudicate upon a matter not in any way involved under the allegations of the complaint. It was held that the court was without jurisdiction to adjudicate upon the particular question, and that the judgment was void as to the matter not included within the relief demanded, citing the statute limiting the scope of default judgments against a defendant not answering. G. S. 1913, § 7896.

The judgment in the case at bar was not entered on default of defendant to appear. Defendant did appear and the title to the land from the view-point of plaintiffs' case was expressly involved. Their title was alleged in the complaint, and stood admitted for want of a denial in the answer. The issues were tried, both parties taking part therein, and although the trial court said to the jury, in instructing a

verdict for plaintiff for the possession of the property, that the title was not involved, nevertheless it was the sole basis on which plaintiffs could predicate their claim to a right of possession. And, since the title as asserted and alleged in the complaint was not denied by the answer, we assume that all the learned trial court intended, by the remark referred to, was to advise the jury that the matter of title was not an issue for their consideration, a perfectly correct statement on the issues as presented by the pleadings.

The judgment adjudging plaintiffs the owners of the land was not therefore void as not within the issues in the case, and, since no relief was applied for upon discretionary grounds within the time limited by statute, it became final and free from attack with the expiration of the time to appeal therefrom. The order vacating it must be reversed.

Order reversed.

OLA MOORE, AS ADMINISTRATRIX OF THE ESTATE OF FRANK S. MOORE, DECEASED v. P. J. DOWNES COMPANY AND RAYMOND E. COPELAND.[1]

November 25, 1921.

No. 22,386, 22,439.

Servant not within course of his employment — judgment in favor of master notwithstanding verdict.

1. Action for wrongful death caused by an automobile driven by the owner's agent. *Held*, that the proofs were such as to justify an order for judgment in favor of the owner, notwithstanding the verdict.

Verdict against driver of car sustained.

2. Evidence considered and *held* sufficient to support the verdict against defendant Copeland.

Damages not excessive.

3. The amount of the verdict is not excessive.

[1]Reported in 185 N W. 395.

Charge to jury.

4. The charge was full and fair and there was no error in refusing to give the requested instruction nor in informing the jury that the given requests were those of the defendant.

Action in the district court for Ramsey county to recover $7,500 for the death of plaintiff's intestate. The case was tried before Molyneaux, J., who when plaintiff rested denied defendants' motions to dismiss the action and for directed verdicts, and a jury which returned a verdict for $4,000. From an order granting defendant Downes Company's motion for judgment notwithstanding the verdict, plaintiff appealed. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, Raymond E. Copeland appealed. Affirmed.

Chester L. Caldwell and *Patrick J. Ryan,* for plaintiff.

Lancaster, Simpson, Junell & Dorsey and *Leavitt R. Barker,* for defendants.

QUINN, J.

On November 18, 1916, Frank Moore, while crossing University avenue in the city of St. Paul at its intersection with Avon street, was struck and thrown to the pavement by an automobile driven by Dr. Hammes. As he rose up onto his elbow he was run over and killed by a car owned by the defendant Downes Company and driven by its agent, Raymond E. Copeland. Plaintiff brought this action, as administratrix of the estate of Moore, against the Downes Company and Copeland, to recover for the benefit of herself and two children. There was a verdict for plaintiff against both defendants in the sum of $4,000, and from a judgment entered after this appeal upon an order granting the defendant Downes Company's motion for judgment notwithstanding the verdict, plaintiff appeals. The defendant Copeland also appeals from an order denying his motion for judgment notwithstanding the verdict, or for a new trial.

The principal contention of the Downes Company upon the trial was that it was not liable for Copeland's negligence, upon the ground that at the time of the accident Copeland was not acting within the scope of

his authority or in the course of his employment. That phase of the case presents the only question here for determination under plaintiff's appeal.

The testimony bearing upon Copeland's employment and his use of the car which he was driving at the time of the accident, was in effect as follows: The Downes Company furnished him a car referred to as a demonstrator, with which to drive about in search of prospective customers and in making sales. This car was of the type and kind which he was selling and he used it for the purpose of showing its merits. He was not restricted nor instructed in its use in the details of making sales, but was left to his own judgment and resources in finding customers and making sales. He had no fixed hours and at times worked evenings. He used this car with his employer's consent at times for minor errands and conveniences to himself. On the night in question Copeland undertook to demonstrate the car to one Peterson, a prospective purchaser who lived at Cedar and Thirty-First, Minneapolis. There were at Peterson's home two friends from St. Paul. After driving Peterson and his friends about for a while for the purpose of showing the car, he returned to Peterson's home and talked for some time about the merits of the car. When the two friends were about to leave for St. Paul, Copeland offered to take them there in his car. They were staying in St. Paul about two blocks south of University avenue and four or five blocks west of Avon street. On his way to St. Paul Copeland stopped in Minneapolis at a drug store and took a friend with him for company on his return. He turned off University avenue at a point four or five blocks west of Avon street, left Peterson's friends at their destination and started to return. As he approached University avenue he looked for a place where he might get some cigarettes. It was about 11 o'clock at night. He observed an open place several blocks to his right on University avenue toward St. Paul. Instead of turning to his left toward Minneapolis, he turned to his right for the purpose of getting some cigarettes. While going in that direction a car driven by Dr. Hammes passed him. As he approached Avon street three blocks distant from where he turned onto University avenue and while driving

east some 30 or 40 feet in the rear of Dr. Hammes' car, he ran over Moore as stated.

The important question upon plaintiff's appeal is whether Copeland was, under the facts shown, engaged at the time of the accident within the course of his employment, or whether he was so far engaged upon an errand personal to himself that it must be said as a matter of law that he had parted with his employment and quit his employer's business, thus exempting the latter from liability on account of his negligent driving. The general rule is that the master is liable for the acts of his servant done in the course of his employment, but is not liable, although the servant has possession of his car, if the servant is using it for his own purposes. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745. In determining this question the discretion with which the servant is vested in the performance of his duties and whether the manner of the use of the vehicle had express or implied consent of the owner, may be considered. It is clear from the facts stated that Copeland parted with his employment when he left the Peterson home for St. Paul. It cannot be said that from that time on he was engaged in the work of his employer, and especially was this true at the time of the injury. He was then in pursuit of his own affairs. Provo v. Conrad, 130 Minn. 412, 153 N. W. 753; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598.

As to the Copeland appeal there was evidence tending to show that he was driving from 20 to 35 miles per hour; that Dr. Hammes was traveling in about the middle of the right hand side of the street; that Copeland was in line with and from 35 to 40 feet back of him; that Hammes suddenly turned his car to the right to avoid striking Moore, who was crossing the street; that the left rear fender of his car struck Moore and knocked him down onto the pavement and that Copeland turned to the left and ran over Moore as he attempted to arise. Hammes adjusted his liability by paying $2,200. This appeal involves only the liability of the defendant Copeland. It was 11 o'clock at night. University avenue is one of the main thoroughfares of the Twin Cities. Appellant was driving so close to the rear of the head car and at such a rate of speed that he was forced to turn to the left instead of slowing

down in the usual manner in order to avoid colliding with it. As his car turned to the left it ran over the deceased. Whether appellant was driving at an excessive rate of speed under the circumstances and failed to exercise due watchfulness for pedestrians crossing the street, was a matter for the jury under proper instructions.

At the time of his death Moore was 46 years of age and was earning $36 per month, his board and the rental of the rooms in which he lived with his wife and daughter, as a laborer on a dairy farm. The verdict is not so large as to warrant any interference by this court. Conley v. Louis F. Dow Co. 130 Minn. 186, 153 N. W. 323, 593; Lawler v. Minneapolis, St. P. & Sault Ste. M. Ry. Co. 129 Minn. 506, 152 N. W. 882.

The issues were fully and fairly submitted to the jury and we find no error in the refusal to give the requested instructions, nor in informing the jury that the given requests were made by the defendants. Curran v. Chicago G. W. R. Co. 134 Minn. 392, 159 N. W. 955.

The judgment appealed from and the order denying the defendant Copeland's motion for judgment or a new trial are affirmed.

THE FIRST NATIONAL BANK OF ST. PAUL v. H. A. BLOCKER.[1]

November 25, 1921.

No. 22,432.

Rescission of contract for fraud — failure to give notice of rescission.

1. An action in equity to rescind a contract for the alleged fraud of defendant may be maintained without the prior service of notice of an election to rescind.

Action is sufficient notice — tender may be made in complaint.

2. The commencement of the action is sufficient notice of such elec-

[1]Reported in 185 N. W. 292.

tion, and the required tender or offer to return what plaintiff received in the transaction may be made in the complaint.

Directed verdict warranted by evidence.

3. The complaint states a cause of action for such a rescission and the evidence received on the trial justified a directed verdict for plaintiff upon the issue of fraud.

New trial.

4. The record presents no error to justify a new trial.

Action in the district court for Ramsey county to recover $75,142.59. The case was tried before Dickson, J., who at the close of the testimony denied defendant's motion for a directed verdict and granted plaintiff's motion for a directed verdict for $82,133.68. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Theo. B. Torkelson and *Morphy, Bradford & Cummins,* for appellant.

O'Brien, Stone, Horn & Stringer, for respondent.

BROWN, C. J.

Action to rescind a contract on the ground of fraud, and to recover what plaintiff parted with in the transaction. Issue was joined by the answer of defendant Blocker; defendant Holm made no appearance. At the conclusion of the trial a verdict was directed in favor of plaintiff for the relief demanded by the complaint, and defendant Blocker appealed from an order denying his alternative motion for judgment or a new trial.

The assignments of error present three principal questions, namely: (1) Whether on the facts disclosed by the pleadings and evidence an action in equity for a rescission of the contract may be maintained; (2) whether the trial court erred in directing a verdict for plaintiff, the contention being that the issues should have been submitted to the jury, and (3) whether there was error in the rulings on the admission or exclusion of evidence.

As we read the record, there is little or no dispute as to the substantial or material facts in the case. Plaintiff is a banking corporation

doing business as such in the city of St. Paul. It had correspondents and business connections with various banks in other points of Minnesota and also North Dakota, among them being the State Bank of Bowman, North Dakota, of which defendant Blocker was president and general manager, a position he had held for a number of years. Defendant Holm was a farmer and rancher residing near Bowman, and was well known to Blocker. Some time early in the spring of 1919, Holm approached Blocker with a proposition of buying a herd of Texas cattle, to be taken to North Dakota and there fattened on the range and thereafter sold on the market. Subsequent negotiations between them resulted in an agreement to jointly enter into the venture as partners. Holm was without means and Blocker agreed to finance the transaction. The amount of money needed was quite large, estimated at the time at $45,000, and was more than Blocker's bank could supply. To meet the situation and procure the money, Blocker applied to plaintiff and solicited a loan to Holm of the amount stated. The request was in the form of a letter written by Blocker to the vice-president of plaintiff bank, and represented that a friend of Blocker was soon to be in need of $45,000 to make a payment on the purchase of 500 three-year-old steers, the loan to run about three months, "at which time he will turn these steers and pay up the note." The letter further stated:

"This is certainly a good loan, and it is good stuff and a good man back of it, but of course it is an excessive loan and we cannot take it here in the bank, so I was thinking I would run it to myself and if agreeable let you people carry it.

"I shall be pleased to hear from you at once in regard to this, for if you are not interested I shall be obliged to look elsewhere. I can absolutely assure you, Mr. Skinner, that there will be no additional time asked on this loan and that six months will be the absolute limit for this to run, and I certainly hope you will see fit to grant me this accommodation."

Plaintiff had other prior dealings with Blocker and he had the full confidence of Mr. Skinner who was in charge of this matter for the bank. And upon the faith and in reliance upon Blocker's representations that the loan was a good one, with a good man behind it, the loan was made

and plaintiff agreed to advance the amount stated. The bank officers did not know that Blocker was a partner of Holm and interested personally in the transaction; that fact was concealed by Blocker. Holm, who was represented as a good man, and his note for $45,000 as "good stuff" was insolvent and unable to pay his debts. He did not own the steers at the time, but expected to purchase them with the funds obtained from plaintiff. This fact was not disclosed to plaintiff by Blocker. On May 15, 1919, in a letter transmitting to plaintiff the Holm note and requesting an increase of the loan to $50,000 Blocker again asserted:

"This is an A No. 1 note in every respect, and I can assure you absolutely it will be paid at maturity. In fact, if present prices prevail, I believe it will be paid some time in September."

Plaintiff then closed the deal and transmitted the necessary credit upon which the full amount of $50,000 was paid over to Holm through the Bowman bank.

On the date of the letter last above quoted Holm had not yet acquired the steers nor any of them, a fact known to Blocker, but not by him communicated to plaintiff. Holm had, prior to the date of the letter, made a trip to Texas and entered into negotiations to purchase some cattle, but none thereof had been selected or set apart to him by the owner. Nevertheless, as security for the payment of the note, Blocker transmitted, with the letter just referred to, a chattel mortgage executed by Holm to Blocker on May 7, 1919, upon 600 head of cattle, recited in the mortgage as being the property of Holm and then in Custer county, Montana. Holm at the time owned no cattle in Montana of the description contained in the mortgage; he did have an option on a herd of like cattle in Texas, but did not own them and could not make a valid mortgage thereon to Blocker. The situation was kept from plaintiff, and when the mortgage was received by Mr. Skinner he was justified in concluding that it covered cattle in fact owned by Holm. Thereafter Holm made a second trip to Texas and then selected a herd of 630 cattle, steers and cows, and subsequently brought them to the range in North Dakota. Witnesses described the cattle in their testimony as poor and drouth stricken, and of value not exceeding $50 per

head, a total of something over $30,000. They did not thrive on the ranges of North Dakota, and were not in shape for sale on the market at any time during the fall of 1919, as contemplated and as Blocker represented they would be, very few of the entire herd being fit for the stock market. For this reason it became necessary to winter the entire herd in North Dakota. That involved considerable expense which Holm could not furnish, and Blocker was either unable or unwilling to supply the necessary funds. In this situation Blocker again applied to plaintiff for financial help. In a letter of September 27, 1919, he wrote plaintiff to the effect that Holm had some 850 or 900 head of cattle and between 25 and 50 head of horses, with 1,000 tons of hay for winter feed; that the prices of cattle were not the best and that Holm thought conditions would be better in November and December; that Holm expected to keep the herd in marketable shape at all times and when prices were right to sell 100 to 200 head at times until the indebtedness to plaintiff was paid up. He therefore requested a further loan to Holm of $25,000 to tide matters over until the market improved. In response plaintiff wrote Blocker that, as they understood the matter, there were in the herd some 700 two to four year steers in prime condition and ready for market, and that Holm intended to dispose of them when the market became attractive. To this Blocker replied:

"Your assumption that the * * * steers are ready for the market is correct, and whenever the market looks satisfactory to Mr. Holm he intends to ship; but he is so busy making hay now that he has no time to think about making a shipment."

In reliance upon the situation thus presented, the bank agreed to advance the additional funds. The representations of Blocker to induce the bank to that end, like those which brought about the first loan, were false and untrue. When the new loan was so applied for, the cattle were not in prime condition as represented, and that fact was known to Blocker, and it was also known to him, by reason of the failure of the cattle to fatten on the range during the summer and fall, it was necessary to carry them through the winter at a considerable expense. There was at the time no intention on the part of Holm or Blocker of shipping any of the cattle to the market for sale, either in 100 or 200

lots or otherwise, for, with the exception of a few head, all were unfit for the market. Again did Blocker conceal his relationship to Holm; he also concealed and failed to make known to the bank that the real motive on his part in procuring the second loan was an understanding with Holm that, if he procured it, the partnership would be dissolved, leaving Holm with the stock and the indebtedness to plaintiff to take care of, and bring out the best results possible. Just prior to this Blocker had disposed of his interests in the Bowman bank, and after the severance of his connection with the cattle deal he set about finding a location for a new bank, and was in California at the time of the discovery of the fraud which brought on this action.

On December 1, 1919, plaintiff was advised of the poor condition of the cattle, and of the falsity of the representations, on the faith of which the money had been loaned to Holm, and after due investigation into the matter promptly brought this action to rescind the contract under which the money was so loaned, and recover the amount so parted with.

1. It is contended that the issues presented by the pleadings should have been submitted to the jury and that the trial court erred in directing a verdict. The contention is not sustained. The facts stated affirmatively appear from the evidence and are without substantial or material dispute. That by the false and untrue representations of Blocker plaintiff was deceived to its damage, finds ample support in the evidence. Prior dealings between them justified plaintiff in reposing special confidence in what he represented as facts and conditions surrounding the transaction, and that plaintiff was induced thereby to loan the money to Holm cannot well be questioned. On the surface Blocker appeared to plaintiff as wholly disinterested, when in fact he was soliciting both loans in his own interest as well as in the interest of Holm. He pictured to plaintiff a desirable investment, though the fact was that it was wholly speculative and of doubtful merit. That plaintiff had the right to rely upon his affirmative representations is clear, and that the falsity thereof renders him liable is affirmed by the recent case of Batchelder v. Stephenson, supra, page 215, 184 N. W. 852; opinion by Mr. Justice Dibell. The case at bar is stronger for recovery, for

here Blocker, who made the false representations, was an undisclosed party and personally interested in procuring the loan from plaintiff.

Manifestly plaintiff's remedy against him was not limited to an action for damages for the fraud; the relief here sought may be had in such case at the election of the defrauded party. I. L. Corse & Co. v. Minn. Grain Co. 94 Minn. 331, 102 N. W. 728. The fact that Blocker may have had no evil motive and did not intend to deceive or defraud plaintiff, is of no controlling importance. It is sufficient in this form of action that the representations were untrue in fact, and that the falsity thereof resulted in injury to plaintiff; fraud as a matter of law follows a showing of such facts from which relief may be had. Schlechter v. Felton, 134 Minn. 143, 158 N. W. 813, L.R.A. 1917A, 556; Helvetia Copper Co. v. Hart-Parr Co. 137 Minn. 321, 163 N. W. 665; Jacobson v. Chicago, M. & St. P. Ry. Co. 132 Minn. 181, 156 N. W. 251, L.R.A. 1916D, 144, Ann. Cas. 1918A, 355; Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710.

Nor was it necessary to the maintenance of the action, one in equity to rescind the transaction, that prior notice of rescission be served upon defendant, coupled with an offer to return the securities received in the transaction. That an action of the kind stated may be maintained and that an offer to return may be made in the complaint or on the trial is supported by all our decisions. Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; 3 Notes on Minn. Reports 660, and citations. The rule is somewhat different where the defrauded party attempts to rescind by his own act. I. L. Corse & Co. v. Minn. Grain Co. 94 Minn. 331, 102 N. W. 728.

That the action was promptly commenced on the discovery of the fraud cannot be questioned on the record. No time was lost in invoking the aid of the court and by the suit advising defendants of its claim to a rescission. The Bowman Bank was not involved in the transaction. The money passed through that institution, but with no secret or other interest in the matter. Blocker made no attempt to act for it, and his own appearance in the deal was as an individual and copartner of Holm and not as an officer of the Bowman Bank.

2. What has been said covers the case and the main contentions made

by defendant in support of the appeal, and results in the conclusion on the merits of the controversy, that the action is one in equity for a rescission of the contract, not one for damages for the fraud nor for money had and received; the complaint states a cause of action and the evidence indisputably shows the fraud relied upon for recovery, therefore a verdict was properly directed for plaintiff. And, in taking leave of the case, we add that all assignments challenging the rulings of the court in the admission and exclusion of evidence have been given careful attention, with the result that no error is shown. There was no abuse of discretion in denying defendant's request to amend the answer.

From all this the final conclusion is that the order appealed from must be and it is in all things affirmed.

ABEL HATINEN, SPECIAL ADMINISTRATOR OF THE ESTATE OF SAM HATINEN, DECEASED, v. JOHN BARTON PAYNE.[1]

November 25, 1921.

No. 22,443.

Service of process on corporation — managing agent defined.

1. A managing agent of a private domestic corporation upon whom a summons may be served under section 7735, G. S. 1913, is an agent having charge and control of some part of the business of the corporation and vested with powers requiring the exercise of judgment and discretion.

General agent in Duluth not a managing agent.

2. The agent upon whom service was made in this action was not a managing agent.

Action in the district court for Carlton county to recover $7,500 for the death of plaintiff's intestate. From an order, Cant, J., setting aside the service of summons and complaint, plaintiff appealed. Affirmed.

[1]Reported in 185 N. W. 386.

Arnold & Arnold, for appellant.

M. L. Countryman and *Baldwin, Baldwin, Holmes & Mayall,* for respondent.

TAYLOR, C.

This is an appeal from an order setting aside the service of the summons and complaint.

The action was brought in Carlton county against the defendant as agent of the President under the Federal Transportation Act, to recover damages for the death of plaintiff's child, alleged to have been caused by injuries sustained in a fire alleged to have been negligently started and allowed to escape by the employes operating the Great Northern Railway while under Federal control. The Federal act, so far as here material, provides that process may be served upon an agent or officer of the carrier "authorized by law to be served with process in proceedings brought against such carrier."

Section 7736, G. S. 1913, provides that, in actions against a railway company, service of the summons "may be made by delivering a copy thereof to any ticket or freight agent of such company within the county in which the action or proceeding is begun." It is conceded that the service was not valid under this statute, for the reason that it was not made in Carlton county, but in St. Louis county, upon H. R. Carl, an agent of the carrier in St. Louis county.

Section 7735, G. S. 1913, provides:

"If the action be against a private domestic corporation, the summons may be served by delivering a copy thereof to its president, vice-president, secretary, cashier, or treasurer, or to any director or managing agent thereof."

The Great Northern Railway Company is incorporated under the laws of this state, and plaintiff contends that Carl was a managing agent of the railway company within the meaning of this provision. The trial court held that he was not a managing agent, and set aside the service on that ground.

This statute must be construed in the light of the fact that it provides a method for making service only on private domestic corpora-

tions which have, within the state, such officers as are designated therein, and that other statutes provide the method for making service on foreign corporations, on public corporations, and on private domestic corporations having no such officers within the state.

As pointed out by the learned trial court, the officers upon whom this statute authorizes service to be made, unless a "managing agent" be an exception, are the principal executive officers of the corporation, and all of much the same rank. In view of the connection in which the term "managing agent" is used, we think the legislature intended thereby only those agents who possess powers similar in character and importance to those possessed by the officers expressly named; that they intended only those agents who have charge and control of the business activities of the corporation or of some branch or department thereof, and who, in respect to the matters entrusted to them, are vested with powers requiring the exercise of an independent judgment and discretion. This is the meaning usually given to the term "managing agent." 26 Cyc. 123; 19 Enc. Pl. & Pr. 662, 680; 9 Fletcher, Cyclopedia of Corporations, 10,380, and the cases cited in these works.

Carl is in the traffic department. At the head of this department there is a director of traffic who is one of the vice presidents. Under him there is a freight traffic manager and a passenger traffic manager. Under the freight traffic manager there is an assistant freight traffic manager and four assistant general freight agents. Under the passenger traffic manager there are four assistant general passenger agents. Carl is subordinate to and under all of these officers. He has an office in the city of Duluth and has four employes under him. He solicits both freight and passenger business, and is called a general agent, to distinguish him from one who is a freight agent only or a passenger agent only. His duty, as he states it, is to get business and see that it is properly handled, and to keep shippers satisfied. He has nothing to do with operating the road, and, whenever any action is required or any service is to be performed, can only present the matter to his superiors, or to the proper department, with his request or recommendation. He cannot issue orders. He quotes tariff rates to prospective patrons and signs bills of lading, but does not handle or sell passenger

tickets. He looks after complaints and endeavors to adjust them, but any action by the company must be authorized by others. He receives and investigates claims and then turns them over to the claim department with his recommendation. He has no power to settle them or to obligate the company to pay them.

We think it clear that Carl was not a managing agent either within the meaning of the statute, or within the meaning of the term as commonly used and understood.

Plaintiff seems to make some point of the fact that the summons had been served on Carl in a large number of actions, and that he had been instructed to deliver all such papers to the attorneys for the company. We fail to see how this fact has any bearing on the question here presented, especially as Carl was, at least, a freight agent of the company in St. Louis county, and, in actions brought in that county, service could properly be made upon him.

The order appealed from is affirmed.

CITY OF CROOKSTON IN POLK COUNTY v. CROOKSTON WATER WORKS, POWER & LIGHT COMPANY.[1]

November 25, 1921.

No. 22,452.

City of Crookston — authority to contract for supply of water.

1. Chapter 12, Sp. Laws of 1879, conferred upon the city of Crookston power to make and establish public pumps, wells, cisterns and hydrants and to provide for water works for the supply of water for its inhabitants for both public and private needs. *Held*, that such provisions vest the municipality with power to enter into contracts with private individuals for the purposes stated.

Rules of private contract apply to municipality.

2. Entering into such contracts and granting a franchise to individuals

[1]Reported in 185 N. W. 380.

does not involve an exercise on the part of the municipality of its legislative or governmental functions as respects the rates and charges to be paid the grantees for a performance of the contracts, or otherwise, but only its proprietary powers, and the rules and principles of law applicable to contracts and transactions between individuals apply thereto.

Action in the district court for Polk county to recover $10,014.54. Defendant's demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained by Watts, J. From the order sustaining the demurrer the city of Crookston appealed. Affirmed.

W. E. Rowe, for appellant.

W. P. Murphy and *Brown & Guesmer,* for respondent.

QUINN, J.

Appeal from an order sustaining a general demurrer to the complaint. The action was brought to recover various sums paid by the city of Crookston to defendant upon claims for deficiency earnings on certain water main extensions in the streets of the city, and also to compel defendant to pay into the city treasury certain license fees upon its gross earnings from August 1, 1918, to December 31, 1919.

The city was organized under chapter 12, p. 14, Sp. Laws 1879. A subsequent act of the legislature, approved March 9, 1885, repealed the act of 1879 and gave the city an entirely new charter, but that act did not take effect until after the granting of the franchise in question. The act of 1879 provides that the territory thereby created as the city of Crookston, shall be a municipal corporation with all the general powers possessed by municipal corporations at common law, and, in addition thereto, shall possess the powers hereinafter specifically granted. The act then provides, in effect, that the common council shall have power "to make and establish public pounds, pumps, wells, cisterns and reservoirs, and to provide for the erection of water works for the supply of water to the inhabitants * * *" (chapter 4, paragraph 11); "to appropriate money and provide for the payment of the debts and expenses of the city" (chapter 4, paragraph 25); that "all property real and personal, within the city, except such as may be exempt by the laws

of the state, or by the ordinance of the city, shall be subject to taxation for the support of the city government, and the payment of its debts and liabilities * * *" (chapter 6, § 1); and "that no money shall be appropriated for any purpose whatever except such as are expressly authorized by this act." (Chapter 6, § 2.)

The basis of plaintiff's action is the occupation of its streets by defendant with water mains and connections, and the operation of a water works system in the city under a franchise granted to one Chase on February 25, 1885, and assigned to the defendant. This franchise expired February 25, 1915. At the time of the granting of this franchise the city owned a water works system, with mains and hydrants, which was, under the terms of the franchise, sold and conveyed to Chase, the grantee agreeing to furnish the inhabitants of the city with a supply of water and to establish and maintain hydrants for fire protection at designated locations, for which he was to charge consumers a fixed rate, and for the hydrants the city was to pay a flat annual rate of $100 each, with the provision that the city, within a stated period, should locate three-fourths of a mile of additional mains with one hydrant every 380 feet, and to pay the same rate as for the original hydrants. This franchise further provided: "That the common council may by resolution require the said K. D. Chase, his successors or assigns, to lay additional water mains, erect additional fire hydrants or service pipes in or along any of the streets, avenues, alleys or public grounds, as they may deem advisable and necessary, but no such requirement shall be made or enforced without first guaranteeing a revenue of at least 8 per cent per annum on the cost of construction and operation of such additional expenditure."

Paragraph 7 of the complaint is as follows:

"That after the passage, approval and adoption of said ordinance of 1885, certain so-called water main extensions were made in said city by the defendant and in respect to which the defendant annually charged to and collected from the plaintiff many thousand dollars for and on account of alleged deficiency in the gross earnings upon and for such water main extensions which charges were made and payments made up to on or about the 1st day of January, 1912; and that although there-

after and during the years 1912, 1913, 1914, 1915, 1916, 1917, up to the 9th day of July, 1918, the said defendant annually charged and presented to the city council of said city for allowance and payment claims for such deficiency earnings upon said water main extensions but the city council disallowed and refused to pay the same; that the aggregate amount of the charges so made and claims so presented by said defendant for such alleged deficiency in gross earnings upon said water main extensions from the period from January 1, 1912, to July 9, 1918, is the sum of thirty thousand seven hundred twenty-two and 66/100 dollars ($30,722.66)."

After the expiration of the 1885 franchise and the disallowance of defendant's claims for deficiency earnings upon the various main extensions from January 1, 1912, to July 9, 1918, the council granted defendant another water works franchise, known as Ordinance No. 176. Section 4 of this franchise provides for the payment by defendant to the city, of an annual license fee upon its gross earnings, and section 14 thereof is as follows:

"In consideration of the agreements herein contained and as a compromise and settlement of the bills heretofore rendered to said city by said company for payment under guaranties of earnings from water main extensions heretofore required by said city under the provisions of the ordinance of 1885, it is agreed that no payments under said former guaranties shall accrue for any period subsequent to August 1, 1918, and that on or before the first day of September, 1918, the amount due under the said guaranties, with interest thereon to the first day of August, 1918, at the rate of six per cent (6%) per annum from the time of installation of such extensions respectively, shall be computed on the same basis as for the guaranties herein provided, that is, on the basis of a guaranty of gross income of fifteen per cent (15%) each year on the cost of installation of the water main extensions; and the total amount of said former guaranties so computed shall be paid by said city to said company with interest at the rate of six per cent (6%) per annum from and after August 1, 1918, and until paid said company may credit said city thereon the amount of license fees herein fixed as such license fees shall become due and payable."

It is alleged in the complaint that, pursuant to the provisions of Ordinance 176, the council and the defendant entered into a pretended settlement of the claims referred to for deficiency of gross earnings on main extensions, in the sum of $7,319.74, which was by the council wrongfully and unlawfully allowed and ordered paid, and that upon October 31, 1918, the sum of $3,819.74 was unlawfully paid to the defendant thereon. It is further alleged that there is due and owing to plaintiff as a license fee from August 1, 1918, to December 31, 1919, as above referred to, the sum of $2,694.80, in all the sum of $10,014.54, for which amount it asks judgment with costs and disbursements.

On July 31, 1906, the city adopted a home rule charter pursuant to the provisions of section 36 of article 4 of the state Constitution, and Ordinance 176 was enacted thereunder, but the provisions of that charter are not pleaded.

The principal contention on behalf of the plaintiff is, that the city had no right or authority to guarantee any alleged deficiency in gross earnings upon such water main extensions, and that the funds of the city so paid were wrongfully converted for private purposes and that such extensions were for the sole benefit of the inhabitants of the city desiring to use defendant's water service.

In adopting its original charter, the city clothed its common council with ample authority to provide for a system of water works to supply its inhabitants with water for corporate and private needs. The validity of the charter is not questioned and its provisions are comprehensive. Acting thereunder the city acquired a plant consisting of a station, equipment, water mains, connections, hydrants, etc. As the city enlarged it became necessary to extend the water facilities. Accordingly the franchise of 1885 was adopted and the plant sold. This franchise fixed the maximum charge for water to private consumers, required the city to pay a stated annual rental for the use of each hydrant, to locate three-fourths of a mile of additional water mains to be installed by the grantee or his assigns within a stated time, with one hydrant each 380 feet, and reserved the right to require further extensions of the mains with hydrants as it became necessary. It also provided that no such requirement should be made or enforced without

first guaranteeing a revenue of at least 8 per cent per annum on the expenditure. Such extensions were so directed and made from time to time and defendant annually presented its claim for deficiency in the earnings of such extensions, which were allowed and paid up to the year 1912, after which they were disallowed and payment refused. When the complaint is read in connection with the two franchises, which were by stipulation made a part thereof, we think it clearly appears that the service from such water main extensions was for the needs of the entire community, as well as for individual consumers; in other words, the extensions were not exclusively for private purposes but for public needs as well, and plaintiff was one of the customers thereof. The provisions of the charter were ample to confer authority on the council to make the contract complained of. Reed v. City of Anoka, 85 Minn. 294, 88 N. W. 981; Anoka Waterworks, etc. Co. v. City of Anoka, 109 Fed. 580; City of Joseph v. Joseph Waterworks Co. 57 Ore. 586, 111 Pac. 864, 112 Pac. 1083; Southern Bell Tel. & Tel. Co. v. City of Mobile, 162 Fed. 523.

It has been held, as a general proposition, that when an extension of the facilities of a public utility is desired and it appears that the revenue to be derived therefrom, at regular rates, will be insufficient to warrant the undertaking, some form of an extension agreement may be made so as to assure the company a fair return for the investment. Boundary Realty Co. v. Hackensack Water Co. P. U. R. 1920 Fed. 1005; Re Cumberland Power Co. P. U. R. 1919E, 966. It was held in Re Hackensack Water Co. P. U. R. 1917E, 106, that a water company may require a guarantee from customers of a reasonable return upon an extension of water mains. It might have been more equitable if the private consumers along the extension had been required to bear their proportionate share of the deficiency, if any there were. However, the city was one of the customers, it required and directed the extensions, and we see no good reason why it might not, through its council, legally enter into a valid settlement and adjustment of the matter. Reed v. City of Anoka, supra. A contract designed merely to provide a gratuity to private individuals would of course be invalid. But the city had agreed to contribute to the deficiency and it was but just

and equitable that it should, as it apparently did, settle its just proportion. Ordinance 176 required the council to adjust the matter. Acting thereunder, that body investigated defendant's claims covering the period of the six years in question and apparently determined the amount which it deemed defendant was entitled to receive and settled the matter accordingly. In these matters the city acted only in its proprietary capacity, and the rules of law applicable to contracts and transactions between individuals apply. We see no legal reason why the arrangement should be disturbed. There is no legal reason suggested why the license fees for a portion of the years 1918 and 1919 might not be applied in payment of the balance so arrived at.

Affirmed.

MRS. JOSEPH SEILER v. COMMERCIAL ACCIDENT INSURANCE COMPANY.[1]

November 25, 1921.

No. 22,461.

Insurance — construction of accident policy — suicide.

1. A policy of accident insurance *held* by its terms to insure against death by violence including suicide.

Printer's error, not mutual mistake — "including" used for "excluding."

2. There was no allegation and no sufficient proof or offered proof of mutual mistake.

Suicide — parties might exclude that defense.

3. It was competent for the parties to agree that, in a policy of insurance against death by violence, the defense of suicide should be excluded.

Finding sustained.

4. The evidence sustains the finding of the jury that the insured was not engaged in an unlawful occupation.

Action in the district court for Ramsey county to recover $5,000 upon an accident insurance policy. The facts are given in the opinion.

[1]Reported in 185 N. W. 383.

The case was tried before Haupt, J., and a jury. Before the introduction of any testimony and when plaintiff rested, defendant's motions to dismiss the action on the plaintiff's statement to the jury that the insured committed suicide, on the ground that such an insurance contract was illegal, were denied. At the close of the testimony defendant's motion for an instructed verdict was denied. The jury returned a verdict for $5,175. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Alphonse A. Tenner and *Philip J. Meighan,* for appellant.

Harry A. Hageman, for respondent.

HALLAM, J.

1. This action is brought by plaintiff as beneficiary under an accident insurance policy issued to her husband, Joseph Seiler. The insured died by a bullet wound self-inflicted. Plaintiff had a verdict. Defendant appeals.

The policy insured against "the effects resulting * * * from bodily injury sustained during the life of the policy solely through violent or accidental means (including suicide, sane or insane * * *)." Although the terms "accident" and "accidental" are frequently used in other portions of the policy, it is plain that the words "violent or accidental means" are broad enough to include the result of violence, not accidental. The language of the policy covered the case and recovery must be sustained, unless defendant can in some manner be relieved from the terms of the policy.

2. One ground of defense is that the use of the word "including" was a mistake, that instead, the word "excluding" was intended. The answer alleges that "said mistake in words * * * was due wholly and solely to oversight, inadvertence and mistake on the part of the defendant." There is no allegation of mutual mistake, no suggestion that terms of a contract differing from the policy issued were ever agreed upon between the parties. We think, too, that the proof offered falls short of showing mutual mistake. There was no offer to prove an agree-

ment as in Haley v. Sharon Tp. Mut. Fire Ins. Co. 147 Minn. 190, 179 N. W. 895. A mistake was no doubt made. As the proof shows, it was a mistake of the printer and of defendant's proof reader in preparing its blank form of policy contract. But the contract was prepared and proffered by defendant and was accepted by the insured as proffered.

The fact that the application was for accident insurance and that the application was accepted, does not make out a preliminary contract upon any particular terms. The expression accident insurance is a very broad one and may, as in this case, include injuries from violence not strictly accidental.

The offered proof that, when the application was taken, it "was discussed" that the policy didn't pay for suicide, falls short of proof of a preliminary contract such as is necessary to warrant relief on the ground of mistake.

3. Defendant contends that, if the policy insures against death by suicide, it is against public policy and void. If the policy were simply a contract of insurance against suicide, the contention would no doubt be well taken. Where the policy insures generally against death by violence and includes suicide, a different question is presented. It has been held that where an ordinary life policy is payable to a beneficiary, without a provision excepting death by suicide, the law of this state permits a recovery, even in the event of suicide when sane. Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162; Olsson v. Midland Ins. Co. 138 Minn. 424, 165 N. W. 474. Some decisions in other jurisdictions are to the contrary, Ritter v. Mutual Life Ins. Co. of New York, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. ed. 693, but the law is settled in this state.

We see no ground for distinction in this particular between a life policy and a policy insuring against death by violence. The fact is, in either case it is often difficult to determine whether death was due to suicide or not, and it is competent for the parties to eliminate controversy and litigation over this question by simply including or failing to exclude deaths by suicide.

4. The policy contains a clause that the policy shall be void and the company shall be liable only for the return of premiums paid if issued to any person "engaged in unlawful occupation." Defendant contends

that Seiler was engaged in the unlawful manufacture of intoxicating liquor at his place of business. The policy was issued March 12, 1920. The proof as to Seiler's unlawful occupation related to the time of a raid March 24, 1920. The evidence was in conflict. The court submitted to the jury the question whether this provision of the policy was violated. The jury found in the negative. The evidence sustains the finding.

Order affirmed.

GUSTAV ZIEGENHAGEN v. ROBERT HARTWIG AND JULIA HARTWIG, HUSBAND AND WIFE.[1]

November 25, 1921.

No. 22,471.

Vendor and purchaser — reformation of description — homestead of defendants.

The evidence in this case sustains findings that defendants, husband and wife, both participated in verbal negotiations for the sale of their homestead; that the husband, with the assent of the wife, went with the buyer to a scrivener to have a contract prepared; that both parties signed it, believing that it was a contract for the sale of the homestead; that through mutual mistake an erroneous description was inserted in the contract. On such findings the court was justified in reforming the contract and enforcing specific performance against both husband and wife.

Action in the district court for Le Sueur county to reform and enforce a contract. The case was tried before Olsen, J., who made findings and ordered judgment in favor of plaintiff. From an order denying their motion to amend the findings or for a new trial, defendants appealed. Affirmed.

Thomas Hessian, for appellants.

L. W. Prendergast and *Moonan & Moonan,* for respondent.

[1]Reported in 185 N. W. 382.

HALLAM, J.

This action is brought to reform the description in a contract for the sale of real estate by defendants to plaintiff and to enforce the contract as so reformed. The court found for plaintiff. Defendants appeal. The contract was in writing and purported to be a contract for a deed of the NE¼ of the SE¼ of section 32. In fact the defendants did not own this property but the defendant Robert Hartwig did own the SE¼ of the SE¼ of said section and it was the homestead of the parties. The contention of the plaintiff is that the parties entered into negotiation for a sale of this homestead to plaintiff and then caused a written contract to be prepared, intending that it should contain the correct description of this property and that the description actually inserted was inserted through mutual mistake.

In Lindell v. Peters, 129 Minn. 288, 152 N. W. 648, Ann. Cas. 1916E, 1130, this court held that a conveyance of the homestead, executed by both husband and wife as required by statute, may be reformed by correcting a mistake in the description of the property intended to be conveyed thereby.

Courts will naturally proceed cautiously in giving relief that will compel a transfer of a homestead, and will likewise proceed cautiously in reforming a written contract on evidence altogether verbal. But parties are bound to observe contract obligations, though they involve a sale of the homestead, and, if proof is satisfactorily made, relief should be granted.

The evidence in this case is in conflict. Plaintiff testified that the verbal negotiation was had with both of the defendants; that both were present when the sale was determined upon and the price fixed; that, with the assent of both defendants, plaintiff and Robert Hartwig went to a scrivener to have a contract of sale prepared and that, after it had been so prepared, it was presented to the defendant Julia Hartwig as such contract and that she signed it. Plaintiff is corroborated by several members of his own family and also in some measure by two disinterested witnesses. Defendants denied that defendant Julia Hartwig was present at any of the preliminary negotiations and denied that she

knew about them, and they testified that the contract was presented to her, with the statement that it was simply a paper for her to sign and that she believed it was a bond in connection with a criminal prosecution then pending against her husband.

The evidence is abundantly sufficient to sustain a finding in favor of plaintiff's contention that both defendants participated in the negotiation, both understanding that the negotiation was for the sale of their homestead, and that the error in the description was due to mutual mistake. This finding must accordingly be sustained and it follows that the decision in favor of plaintiff should be affirmed.

Affirmed.

FRED ANDERSON v. A. E. JENNEY MOTOR COMPANY AND WILLIAM HAACK.[1]

November 25, 1921.

No. 22,490.

Right of way at street intersection — violation of statute constitutes contributory negligence.

The evidence shows that plaintiff was guilty of contributory negligence as a matter of law in failing to yield the right of way at a street intersection to an automobile coming from his right on the intersecting street.

Action in the district court for Hennepin county to recover $2,550 for injuries to plaintiff's person and property in a collision with a car driven by defendant Haack. The case was tried before Dickinson, J., and a jury which returned a verdict for $150. Defendants' motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendants appealed. Reversed and judgment directed for defendants.

Dille, Hoke, Krause & Faegre and *R. F. Merriam,* for appellants.

S. R. Child and *Sherman Child,* for respondent.

[1]Reported in 185 N. W. 378.

TAYLOR, C.

This action grows out of a collision between two automobiles at a street intersection in the city of Minneapolis, and the sole question presented is whether plaintiff was guilty of contributory negligence as a matter of law.

On the forenoon of November 13, 1919, plaintiff was driving his Ford runabout along Tenth street, and defendant Haack was driving a Hupmobile belonging to defendant motor company along Mary Place which intersects Tenth street at right angles. As plaintiff was crossing the intersection his car was struck by the Hupmobile coming from his right on the intersecting street. The plat in evidence shows that the roadway is 34 feet in width between curbs on both streets. For the purposes of this appeal we shall take the facts to be as stated by plaintiff himself. From his testimony it appears that his rate of speed was between 12 and 15 miles an hour and the rate of defendant's car about 35 miles an hour; that, if he had looked, he could have seen defendant's car when he was some 40 or 50 feet distant from the curb line of Mary Place; that he did not see until he crossed the curb line; that he could have stopped his car within 12 or 14 feet, and that, instead of doing so, he attempted to cross ahead of the other car and the collision occurred. He marked on the plat the approximate position of both cars at the time he first saw defendant's car, but made no estimate of the distance of either from the point of collision. The positions marked on the plat would indicate that when he saw defendant's car he was some 20 feet from the point of collision, and defendant's car something more than twice that distance from that point.

Defendant's car, coming from the right on the intersecting street, had the right of way, and, as said in Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173, 11 A. L. R. 227, if it was near enough so that there was reasonable danger of collision if both proceeded, it was plaintiff's duty to yield the right of way, and he was not warranted in taking close chances. Plaintiff saw defendant's car, when it was something less than 50 feet from the place of collision, and knew that it was coming very rapidly, for he estimated its speed at 35 miles an hour. The late case

of Lindahl v. Morse, 148 Minn. 167, 181 N. W. 323, is, in its facts, almost identical with the present case. In that case the plaintiff saw the defendant's car coming from his right on the interesting street when it was about 40 feet from the intersection. It was coming at a speed of about 30 miles an hour. The plaintiff attempted to cross ahead of it and the cars collided. It was held that the plaintiff was guilty of contributory negligence as a matter of law in failing to yield the right of way as required by the statute. We are unable to distinguish the present case from that case, and, following it, hold that plaintiff was guilty of contributory negligence as a matter of law.

It is true that the defendant in both these cases was also guilty of negligence in approaching the crossing at such an unreasonable rate of speed, but, as said in Rosenau v. Peterson, 147 Minn. 95, 179 N. W. 647, where the collision results because both parties are negligent, neither can recover from the other. If plaintiff had not known that defendant's car was coming at an unusual rate of speed, the situation would be different, but, with that knowledge, he was not justified in trying to beat it across the intersection.

The judgment is reversed and judgment directed for defendants.

HOLT, J. (dissenting).

I dissent. The place where this collision occurred emphasizes, to my mind, the error of the rule applied in Lindahl v. Morse, 148 Minn. 167, 181 N. W. 323. This collision was in a down town district where vehicles are continuously upon street intersections at certain times of the day. In order to make safe crossings and at the same time not impede traffic, it is necessary for vehicles to keep in motion as continuously as practicable. One of the objects of traffic regulations, is, no doubt, to facilitate travel at street crossings. If no driver can venture upon an intersection when another vehicle is seen approaching from his right, at high speed and some distance away, without being held guilty, as a matter of law, of contributory negligence, should a collision occur, he must stop his car. By the time the first comer to his right has crossed, another from the same direction is in sight, and he, being at a stop,

cannot start quickly enough to get across safely because of the continuous stream of vehicles coming from his right. Meanwhile he is to the right of vehicles approaching from his left, and they must also be stopped, because as to them he has the right of way. Under the rule of the Lindahl case an ox team could never hope to cross a down town street in Minneapolis, except possibly between 2 a. m. and 6 a. m. for some of these reckless speeders, especially delivery trucks, to the right of the team, would surely be in time to hit the rear of the wagon, even if two blocks away when the team first entered the intersection, and the same holds true of a slow horse team.

I maintain that it is wrong to determine, as a matter of law, that it is negligence for a driver to enter a street crossing whenever a vehicle approaches from his right which has not yet come so near, but that, if its driver properly complies with the law as to reducing speed at crossings, there will be no collision. The matter should be left to the jury in each particular case with appropriate instructions. There are so many varied circumstances that surround every accident at a street crossing that the question of whose was the fault should be determined by the triers of fact.

In this instance defendant was required to slow down for the intersection. He was also to yield the right of way to those approaching his right on Tenth street. Plaintiff could rely that defendant would observe these rules of the road, at least up to the moment it appeared that he would not do so. Strictly speaking the space where defendant had the right of way was only the northeast quarter of the intersection. Here a mere slowing down of defendant to what the jury might well have found a reasonable speed for that place, would have given plaintiff ample time for a safe crossing.

When negligence comes to depend upon a question of seconds in connection with other circumstances, it should be solved by the jury and not by the court. Indeed, I think, a plaintiff who has suffered from a collision at a street intersection, should not be held guilty of contributory negligence, as a matter of law, unless it appears without dispute that the intersection was entered by him at the same moment that the vehicle to his right, with which he collided, entered, and that this vehi-

cle, having the right of way, was operated at a speed that was proper and reasonable under the circumstances. It is proper to give the jury the law as stated in Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173, 11 A.L.R. 227, that a driver of a vehicle is "not warranted in taking close chances," but it is for the jury to determine whether or not he has done so. As pedestrians we have often had the experience of having to jump forward or backward to dodge a car which, when we started to cross the street, was a block or farther away, but which was upon us before the sidewalk on the other side was reached. The rule adopted increases the reckless speed at which some drivers approach a crossing where they consider they have the right of way.

DIBELL, J. (dissenting).

I concur in the view of Justice Holt.

FRANK A. KUNZ v. THORP FIRE-PROOF DOOR COMPANY.[1]

November 25, 1921.

No. 22,497.

Automobile — right of way at intersection of street when no car in sight.

Where a traveler, on coming to a street intersection, looks to his right and sees no vehicle approaching, and then proceeds across the intersecting street, he is not, as a matter of law, violating the law which requires him to give the right of way to vehicles approaching from the right.

Action in the municipal court of Minneapolis to recover $600 damages for injuries to plaintiff's automobile caused by the negligence of defendant's driver. The answer interposed a counterclaim for $300. The case was tried before Charles L. Smith, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony denied defendant's motion for a directed verdict and a jury which

[1] Reported in 185 N. W. 376.

returned a verdict for $200. From that part of the order which denied its motion for judgment notwithstanding the verdict, defendant appealed. Affirmed.

F. H. Durham, for appellant.

Cobb, Wheelwright & Benson and *R. A. Scallen,* for respondent.

HALLAM, J.

This is an action for damages arising out of a collision of automobiles. Plaintiff had a verdict. The court granted a new trial as to the one issue of the responsibility of the defendant for the negligence of the driver of defendant's car. Defendant appeals. The appeal raises one question, namely, whether the court should have granted a new trial of the issue of plaintiff's contributory negligence.

The evidence on behalf of plaintiff is as follows: Plaintiff was driving north on Marshall street, in Minneapolis, and on the right side of the street, at a speed of about 10 miles an hour. When he reached the intersection of Marshall street and Tenth avenue, he looked to the right, but saw no one approaching. He then proceeded across Tenth avenue. While so doing, he saw defendant's car coming from the right at a speed estimated as high as 30 miles an hour or more. To save himself from being struck broadside he turned sharply to the left. Defendant's car struck plaintiff's right rear wheel with such force as to project plaintiff's car against a truck standing on Tenth avenue to the left of the intersection.

We are of the opinion that this evidence sustains a finding that plaintiff was not negligent. In Gibbs v. Almstrom, 145 Minn. 35, 176 N. W. 173, 11 A.L.R. 227, it was held that under chapter 119, § 22, pp. 164, 165, Laws 1917, "when a driver approaches a street intersection, if he sees a vehicle approaching from his right, and near enough so that there is reasonable danger of collision if both proceed, then it is his duty to yield the right of way."

This doctrine was reaffirmed in Syck v. Duluth St. Ry. Co. 146 Minn. 118, 177 N. W. 944; Rosenau v. Peterson, 147 Minn. 95, 179 N. W. 647; Lindahl v. Morse, 148 Minn. 167, 181 N. W. 323. It was, of course, not intended by what was said in the Gibbs case that the mere fact that a driver does not see a vehicle approaching from his right

should in any sense relieve him from negligence, if, under the circumstances, he ought to have seen it. This was made clear in the Syck case, where plaintiff was held negligent in that he did not look to see if a vehicle was approaching from his right.

But where, as in this case, the traveler looks to the right and sees no vehicle approaching, the case is different. Just why plaintiff did not see defendant's car approaching is not made very clear. It may have been obscured by traffic on the street, or it may have been so far away that to one looking hastily, as a driver on a thoroughfare must, it was not observed as presenting "reasonable danger of collision." In either event plaintiff would not be chargeable with negligence as a matter of law. There is nothing to show that plaintiff did not look with as much caution as does the ordinarily prudent traveler. He was not required to stop to look the length of the street, nor to wait for the whole stream of distantly approaching traffic to pass. The evidence was such as to sustain a finding that plaintiff performed his full duty under the right of way statute as construed in the cases cited.

Order affirmed.

STATE EX REL. RUTH M. DONOVAN v. DULUTH STREET RAILWAY COMPANY.[1]

November 25, 1921.

No. 22,500.

Workmen's Compensation Act — limitation of action — amendments construed.

The compensation act of 1913 contained no limitation of the time for bringing suit. The amendatory act of 1915 limited the time to "one year after the occurrence of the injury." The act of 1919 amended certain portions of the 1915 act "to read as follows"; and the phrase quoted above was made to read "one year after the employer has made written report of the injury to the commissioner of labor of the state." The law all the time required the filing of such report. None was filed. The

[1]Reported in 185 N. W. 388.

plaintiff was injured on October 1, 1918, and brought her action in January, 1921. It is held that the 1919 limitation was a substitute for the 1915 limitation; that the 1915 amendment commenced running on October 1, 1918; that it had not run on April 22, 1919, when the 1919 amendment was approved; that it did not run afterwards; that the 1919 amendment operated to enlarge the 1915 limitation; that it applied to actions on which the 1915 limitation had not run; and that the plaintiff's cause of action was not barred when her action was commenced.

Upon the relation of Ruth M. Donovan the supreme court granted its writ of certiorari directed to the district court for St. Louis county and Honorable H. A. Dancer, judge thereof, to review its order sustaining a demurrer to the complaint in an action brought under the Workmen's Compensation Act by Ruth M. Donovan, employe, against Duluth Street Railway Company, employer. Reversed.

Andrew Nelson and *John Cedergren,* for relator.

Finlayson & Watts, for respondent.

DIBELL, J.

Certiorari to review an order of the St. Louis district court sustaining a demurrer to the complaint in a workman's compensation case. The question is whether the proceeding was barred by the statute of limitations.

The first compensation act was enacted in 1913. Laws 1913, p. 675, c. 467. It contained no limitation of the time for instituting a proceeding to recover compensation. The amendatory act of 1915, Laws 1915, p. 294, c. 209, § 8, added a section, designated section 20A, limiting the time for the bringing of a proceeding by the injured employe to "one year after the occurrence of the injury." Laws 1919, p. 387, c. 363, amended section 20A "to read as follows;" and the limitation above quoted was made to read "one year after the employer has made written report of the injury to the commissioner of labor of the state." The law then required, as it does now, that the employer file a report of accidents with the commissioner of labor. G. S. 1913, § 3892.

The plaintiff was injured on October 1, 1918. She instituted this proceeding in January, 1921. The defendant filed no report with the

commissioner of labor. The one year limitation fixed by the 1915 act commenced running on October 1, 1918, the date of the injury. It had not run on April 22, 1919, the date of the 1919 amendment. If it continued to run after that date the bar was complete when plaintiff's action was commenced in January, 1921. The 1915 limitation, if applicable, bars the action. If the limitation fixed by the 1919 amendment applies, the action is not barred.

When a statute is amended "to read as follows," the amendatory act is a substitute for the act amended. State v. Routh, 61 Minn. 205, 63 N. W. 621; Rundlett v. City of St. Paul, 64 Minn. 223, 66 N. W. 967; Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717; State v. Jones, 98 Minn. 6, 106 N. W. 963; State v. District Court of Ramsey County, 134 Minn. 131, 158 N. W. 798. In the first case cited Chief Justice Start said that the amendatory statute so reading "repeals everything contained in the original statute not re-enacted, and the amended statute is to be construed, as to any action had after the amendment, as if the statute had been originally enacted in the amended form." This thought has been expressed in varied language from case to case.

The 1915 limitation had not run against plaintiff's cause of action at the time of the amendment of 1919. It did not continue running after that. The 1919 amendment was a substitute for it and changed the limitation. In 1 Wood, Limitations (4th ed.) § 12, this is stated to be the rule:

"If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect, but that the time past is effaced, and the new law governs. * * * In other words, the statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar."

So, where the time within which an action to foreclose was changed from 10 years to 15 years, the new limitation was held to apply to all cases where the former statute had not run before it took effect. Brad-

ley v. Norris, 63 Minn. 156, 65 N. W. 357. The rule seems in harmony with what is said in Burwell v. Tullis, 12 Minn. 486 (572), and Holcombe v. Tracy, 2 Minn. 201 (241). Neither State v. General A. F. & L. A. Corp. 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615, nor State v. District Court of St. Louis County, 138 Minn. 213, 164 N. W. 812, is opposed. There the court had under consideration a statute which gave a limitation where there was none before. Its operation was postponed. This indicated an intended operation upon existing causes of action. The opinion of the court was directed to the general rule that a limitation statute is prospective, when rights will be cut off by it, and it was held that, in the particular situation, notwithstanding the statute was to become operative in the future and not presently, it did not affect existing causes. The court did not have to do with the well enough settled rule that an extension of the limitation period operates in favor of causes of action against which the limitation has not run. These cases hold that the limitation in the act of 1915 did not operate retroactively upon a cause of action occurring prior to its passage and so destroy it. Nor is Beach v. Gendler, 148 Minn. 421, 182 N. W. 607, opposed. There the 1915 limitation had run before the 1919 amendment.

A statute of limitation is not a matter of substantive right but of remedy. It is not at all unusual to extend the time for bringing suit, and to apply the new statute to causes against which the old statute is running. It is quite another thing to shorten the period and apply the statute retroactively and thereby cut off or unreasonably limit existing rights.

Order reversed.

BROWN, C. J. (dissenting).

I see no way of distinguishing this case, either in its controlling facts or the principles of law applicable thereto, from State v. General A. F. & L. A. Corp. 134 Minn. 21, 158 N. W. 715, Ann. Cas. 1918B, 615, and State v. District Court of St. Louis County, 138 Minn. 213, 164 N. W. 812, and therefore respectfully dissent. At the time the cause of action in the General Accident Fire & Life Assurance Corporation Case

arose, the compensation law contained no limitation for the commencement of actions thereunder; the time was unlimited. But the act was amended in 1915 in various respects, including the addition of a new section, by which the right of action was limited to one year from the date of injury. It was held in that case that the statute had prospective operation only, and did not apply to existing rights of action; that such statutes are to be given a retrospective operation only when a legislative intent to that effect clearly appears. The rule there applied was followed in the Berwind Fuel Company case, where the court took occasion to summarize and state the rules generally applied in construing limitation statutes by the different courts of this country, concluding with the direct holding that this court had adopted the rule of prospective operation. Prior to those cases there was perhaps some uncertainty in previous rulings upon the question, Burwell v. Tullis, 12 Minn. 486 (572); 1 Notes on Minn. Reports 477, but the decisions then rendered definitely and without qualification adopted the rule stated, a rule which finds support in the authorities elsewhere. It controls the case at bar. Plaintiff's cause of action existed at the time of the amendment of 1919, and was, under that rule, unaffected thereby, it had six months to run after the adoption of that act.

None of the cases cited from this court to sustain the present decision involved the construction of limitation statutes, and therefore are not in point. In each the court applied the familiar rule that an amendment of a statute "to read as follows" is in legal contemplation a new and independent enactment as respects the new matter contained therein. Or, as expressed by Mr. Justice Hallam in State v. District Court of Ramsey County, 134 Minn. 131, 158 N. W. 798, the amended statute can have no other or different construction or effect than would have been given an independent enactment on the subject, citing St. Paul, M. & M. Ry. Co. v. Broulette, 65 Minn. 367, 67 N. W. 1010. In this respect the amendatory act of 1919, as to the new matter therein, is precisely of the same independent character as the act of 1915, to be given the same forward operation and effect. Stein v. Hanson, 99 Minn. 387, 100 N. W. 821.

JOHN ZACHARIAS v. JOHN W. NESBITT. GEORGE A. CAMENT v. SAME.[1]

November 25, 1921.

Nos. 22,503, 22,504.

Highway — tree dangerous to travelers — duty of abutting owner.

1. There is no legal duty resting on the servient fee owner, upon whose land is a duly established county road, to safeguard the traveler on such road against dangers from defects in growing trees standing within the limits of the road.

Not changed by notice to owner to remove trees.

2. The fact that the town board, in anticipating the grading of a roadway upon the right of way, gave notice to defendant to remove the trees thereon, could not place him under the legal duty to so do.

Two actions in the district court for Hennepin county, one to recover $24,800 and the other to recover $7,450 for injuries received from a falling tree. Defendant's demurrer to the amended complaint in the Zacharias case was overruled by Steele, J. The cases were tried together before Waite, J., who when plaintiff rested at the close of the testimony denied defendant's motion for a directed verdict in each case, and a jury which returned a verdict for $3,250 and $900, respectively. From orders denying his motions for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed with direction.

Carleton & Carleton and *Kingman, Cross, Morley & Cant,* for appellant.

Louis Solem and *W. H. McDonald,* for respondent.

HOLT, J.

During a windy April day a tree standing on defendant's land, but within the limits of a public highway in Hennepin county, fell across

[1]Reported in 185 N. W. 295.

the traveled part of the highway, injuring severely two young men who then happened to drive past in an automobile. Each sued defendant. The actions were tried as one. Separate verdicts of substantial amounts were given the plaintiffs. Defendant appeals from the order denying his motion in the alternative for judgment notwithstanding the verdicts or a new trial.

South of defendant's land the Shakopee road runs east and west, and on the east thereof is the Highland road, also called County Road No. 134. The latter has existed for over 20 years as a duly laid out public highway, four rods wide. About 1,400 feet north of the Shakopee road, between the graded driveway and the west boundary of the Highland road the tree in question grew. It stood on ground owned by defendant subject to the easement of the public road. It was a large white oak, estimated to be over 160 years old. There was a defect in it, such as is often seen in old trees. On the easterly side, near the bottom and between two roots was a hole or cavity, variously described as being from the size of a squirrel hole to an opening several inches across and up to two feet high. One old man testified that this opening had existed practically in the same condition for over 40 years. There is evidence that fire had been set in this opening a day or two before the tree fell, and was burning at the time of the accident. No claim is made that defendant knew of, or was responsible for, this fire. The tree near the ground was over three feet in diameter. After it fell the trunk was sawed off some 12 feet from where it broke, and there showed sound greenwood all through. It is uncontradicted that it leafed out each year, and that the bark was intact all around, except where the hole was. From the ground up to about nine feet it was hollow, as disclosed after it fell, the outer rim or shell, with the bark, being only a few inches thick at places. The wind was very strong during the day of the accident, registering a velocity of about 27 miles an hour. However, this was not an exceptionally high April wind. In the view we take of the case it is not necessary to further state the contentions in respect to the condition of the tree, or defendant's knowledge thereof.

The actions were predicated upon defendant's negligence in suffering the tree which he knew or ought to have known to be a menace to safe

travel to remain on the right of way. In other words, he is charged with a failure of duty. If no duty rested upon him to protect travelers against dangers lurking in trees growing upon the highway, the verdicts have no foundation, and there should be judgment notwithstanding.

Where the tree stood, the public held a dominant easement and defendant the servient fee. He no doubt could have cut down and appropriated the tree at any time he saw fit. The timber belonged to him. Town of Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166, 9 A.L.R. 1265. But the highway authorities could likewise have cut down the tree, if dangerous to travelers. When this tree fell across the road, the duty to remove it did not rest on defendant, but on the public authorities charged with the supervision and maintenance of the road. Blackwell v. Hill, 76 Mo. App. 46. While the abutting owner may remove from the highway material not needed or essential for the construction or repair of the same, there is no affirmative act required of him so to do in order to maintain the easement in condition for safe use. Defendant could not have been compelled by law to cut down and remove this tree upon proof that it was a menace to travelers. He was not bound to assume control over or appropriate any tree growing upon the right of way. He had not placed it there. The servient fee owner to a dominant highway easement is not supposed to patrol the road and examine the trees growing thereon to ascertain at his peril whether they or any limbs thereof are likely to fall in the often violent storms so frequent in this state. The authorities chargeable with the maintenance of streets and highways generally have been held to the duty of protecting against dangers from falling trees and branches. This negatives such duty on abutters or servient fee owners. Jones v. City of New Haven, 34 Conn. 1; Chase v. City of Lowell, 151 Mass. 422, 24 N. E. 212; Wright v. City of Chelsea, 207 Mass. 460, 93 N. E. 840; Lundy v. City of Sedalia, 162 Mo. App. 218, 144 S. W. 889; McGarey v. City of New York, 89 App. Div. 500, 85 N. Y. Supp. 861; Vosper v. Mayor, etc., of New York, 17 Jones & S. (N. Y.) 296. The same is the case where a limb hangs so low over the way as to injure a driver. Embler v. Town of Wallkill, 132 N. Y. 222, 30 N. E. 404. And that

accords with the general rule that, where a duty is imposed, a failure to discharge the same, which results in an injury to another, gives rise to a cause of action against the one who failed in such duty.

However, some courts hold that, when this duty is placed by statute on a municipality as a governmental agency, there is no liability unless in virtue of an expressed purpose so to do. So in this state it has long been settled law that a town is not liable for damages occasioned by defects in its public highways, although charged with the duty of keeping them in repair. Altnow v. Town of Sibley, 30 Minn. 186, 14 N. W. 877, 44 Am. Rep. 877. But that does not mean that liability for injuries for defects in rural highways must be placed by the courts upon some one else. It is asserted in Hewison v. City of New Haven, 37 Conn. 475, 9 Am. Rep. 342: "The owners of trees standing on the highway are liable at common law for injuries occurring in consequence of their neglect to trim them and keep them safe." If this be true, there might be some substance to the claim for a recovery here. The court, however, cites no authority and our search reveals none. Neither Blackstone nor Kent suggests the existence of such a common law doctrine. The case of Weller v. McCormick, 52 N. J. Law, 470, 19 Atl. 1101, 8 L.R.A. 798, is the authority for the rule that, where a tree has been planted in a public street in part to serve the desires of the abutting owner, a duty rests upon him to protect the traveler against any defects that might develop in the tree.

Whether a different rule should apply to trees planted by the abutting owner in a village or city street and trees found growing upon a rural highway when laid out, we shall not now stop to determine. But we conclude that there is no affirmative duty imposed by law upon the owners of land abutting a duly laid out country road to examine the trees growing thereon and remove those which, because of decay or other conditions, might be liable to fall or shed branches during storms or high winds. Many of our public highways pass through timbered country, and upon the prairies owners have been encouraged to plant trees. It will add a very heavy burden on the servient fee owner if he must exercise the supervision and care for the dominant easement in this respect. If such a duty is laid upon him he becomes liable, in

case of a failure, to respond in damages that may sweep away the value of his whole farm by some unfortunate accident like the present. Severe wind storms are not rare in this state, and a jury influenced by sympathy for the injured party are so prone to find the accident the result of negligence upon the slightest pretext. It is not readily determined by looking at, or even by carefully examining, a tree whether or not it or some of its branches may be apt to fall in a storm or strong wind. We think the risk from falling trees located on rural highways must be assumed by the traveler, since the authorities, charged with the duty of the maintenance of such road, act only in a governmental capacity under the law as it now exists.

In Michigan, by express statute, towns are liable for neglect in the maintenance of roads, but the court, in Miller v. City of Detroit, 156 Mich. 630, 121 N. W. 490, 16 Ann. Cas. 832, 132 Am. St. 537, construed the statute not to extend to guarding against overhead dangers, and observed in respect thereto [p. 634]: "We may take judicial notice that many trees annually shed large numbers of dead limbs. Usually they are small in proportion to the limb in this case, but many are large enough to seriously injure a person upon whom they should fall. They are all within this rule contended for; and never in the history of the country has there been an attempt to compel municipalities or private persons to assume the dangerous and expensive burden of anticipating and performing the function, so well and so far so safely performed by nature, of maintaining a living tree in a safe condition." There was no contradiction of the testimony that the oak here in question was a living tree.

The general rule as stated in Elliott, Roads and Streets (3d ed.) § 898, is: "In the absence of any legislative enactment upon the subject, an abutting landowner is not liable to travelers for injuries received by them because of a defect in the street in front of his premises, unless such defect was caused by his own act or fault." Decayed limbs of trees, or trees likely to fall, are usually regarded as defects in highways, which those charged with the duty of maintenance should remedy or remove, as indicated by the authorities first above cited. In Noonan v. Stillwater, 33 Minn. 198, 22 N. W. 444, 53 Am. Rep. 23, it

was held, in effect, that the responsibility and consequent liability of safe maintenance of a street could not be shifted from the municipality to the abutting owners so as to give rise to a cause of action against the latter in favor of one injured because of negligence in remedying defects.

In 1915 in contemplation of grading a roadway in front of defendant's land, the town supervisors served a written notice upon him to remove the trees from the limits of the road. He did not do so. This notice could have no effect in creating a duty not otherwise imposed by law. It is also plain that this notice was only intended to give defendant warning that, if he wished to exercise his right to remove and appropriate the trees growing in the roadway to be graded, he must do so. If not, the supervisors would do it. As stated above, the law does not compel him to do any work, or to do any affirmative act in respect to the natural objects found in or upon the highway limits in order to protect travelers thereon.

This conclusion leads to a reversal of the order denying judgment notwithstanding the verdict, and other errors assigned need not be mentioned.

The order denying defendant judgment is reversed, and the causes remanded with direction to enter judgment in each case in favor of defendant notwithstanding the verdict.

GEORGE FAIRLEY v. CITY OF DULUTH AND OTHERS.[1]

November 25, 1921.

Nos. 22,552, 22,553.

Injunction — representative action to restrain enforcement of illegal tax.

1. Where an ordinance of a city imposes an unauthorized and illegal tax which affects in the same way a large number of its residents, who have a community of interest in the controlling principle of law in-

[1]Reported in 185 N. W. 390.

volved, the decision of which will affect their separate property rights, the means of enforcement of the ordinance being drastic, the legal relief against the tax by an individual being attended with an expense out of proportion to the amount involved and practically not worth pursuing, but in combination with others similarly situated relief in equity being complete. a representative action may be maintained by one or more aggrieved persons in behalf of themselves and others similarly situated and appropriate relief be given by injunction.

Relief not refused because part of tax held legal.

2. The rule is that a party cannot have a tax enjoined as illegal, without the payment of the portion confessedly valid. In this case the plaintiff's claim, made in good faith and on plausible and reasonable grounds, was that the whole tax was illegal. Relief as to the illegal tax will not be refused because the plaintiff did not pay before suit the tax found to be legal.

Wheelage tax — statute construed.

3. Laws 1921, c. 454, § 1, subd. 1, provides that no wheelage tax on motor vehicles imposed by a municipality "shall exceed a sum equal to twenty per cent tax imposed by the state in lieu of all other taxes." This provision means that the wheelage tax shall not exceed 20 per cent of the state tax, which on the same date was fixed on a basis of 2 per cent of value, and the statute is not void for indefiniteness or uncertainty.

Exemptions unconstitutional — balance of act valid.

4. Conceding that subdivision 3 of section 1 of chapter 454 exempting from the wheelage tax vehicles used for the purpose of selling or peddling the products of farm or garden, is unconstitutional, it is not so connected with the rest of the act as to render the whole unconstitutional, and there is left a workable and constitutional statute.

Action in the district court for St. Louis county to restrain defendants from enforcing certain ordinances of defendant city. From an order, Cant, J., overruling their demurrer to the complaint and granting a temporary injunction, defendants appealed. Affirmed.

John B. Richards, City Attorney, for appellants.

John Jenswold and *John D. Jenswold,* for respondent.

DIBELL, J.

The defendants appeal from an order overruling their demurrer to the complaint and from an order granting a temporary injunction.

The complaint asked an injunction against the enforcement of an ordinance of Duluth imposing a wheelage tax on motor vehicles. The trial court held that the wheelage tax was valid to an amount not exceeding 20 per cent of the 2 per cent value tax imposed by the state on motor vehicles by the statute of 1921. An order was entered forbidding the enforcement of the wheelage tax in excess of the amount stated and overruling the demurrer.

Section 3 of article 16 of the Constitution, adopted at the November, 1920, election, is as follows:

"The legislature is hereby authorized to provide, by law, for the taxation of motor vehicles, using the public streets and highways of this state, on a more onerous basis than other personal property, provided, however, that any such tax on motor vehicles shall be in lieu of all other taxes thereon, except wheelage taxes, so-called, which may be imposed by any borough, city or village. Any such law may, in the discretion of the legislature, provide for the exemption from taxation of any motor vehicle owned by a nonresident of the state, and transiently or temporarily using the streets and highways of the state. The proceeds of such tax shall be paid into said trunk highway sinking fund." See Laws 1919, 737, 751.

Chapter 461, p. 708, Laws 1921, approved April 23, 1921, provides a lieu tax on motor vehicles of 2 per cent of the manufacturers' retail list price at the factory when new, with certain deductions as they become older, and with certain maximums and minimums. It is a value tax except that motor cycles bear a fixed tax.

Chapter 454, p. 697, Laws 1921, approved April 23, 1921, is as follows:

"Section 1. Any borough, city or village may impose a wheelage tax upon motor vehicles using the public street or highways, provided that:

"Subd. 1. No wheelage tax imposed by any borough, city or village shall exceed a sum equal to twenty per cent tax imposed by the state in

lieu of all other taxes, except such wheelage tax, upon motor vehicles using the public streets or highways.

"Subd. 2. No borough, city or village shall impose a wheelage tax upon the vehicle of any person not a resident of such borough, city or village, unless such vehicle shall be used principally upon the streets or highways of such borough, city or village.

"Subd. 3. No such wheelage tax shall be imposed upon any vehicle used upon the public streets or highways solely for the purpose of selling or peddling the products of the farm or garden, occupied and cultivated by the owners of such vehicles.

"Sec. 2. This act shall take effect and be in force from and after its passage."

The Duluth wheelage tax is imposed by ordinance under authority of the home rule charter. It was sustained in Park v. City of Duluth, 134 Minn. 296, 159 N. W. 627. It provides for a specific tax on motor cycles, a tax based on horse power on ordinary autos, and a tonnage tax on auto trucks. Unlike the state tax it is not an ad valorem tax. It is a privilege tax based on the character of the vehicle. It is not a police measure.

By Laws 1921, p. 762, c. 465, approved April 23, 1921, provision is made for a refundment by the municipality "in all cases where persons have paid a wheelage tax * * * in excess of the amount which a municipality may at the time of the passage of this act lawfully impose and collect."

By G. S. 1913, § 7674, it is provided that "when the question is one of common or general interest to many persons, or when those who might be made parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

These are all the statutory provisions which we find it necessary to note.

The plaintiff is a resident taxpayer of Duluth and the owner of an automobile. The Duluth wheelage tax imposed upon his auto exceeds 20 per cent of the state lieu tax. There are in Duluth 4,200 residents

owning and using upon the streets 5,500 motor vehicles. More than 90 per cent of these owners are subject to a wheelage tax in excess of 20 per cent of the state tax.

The complaint alleges in substance that the auto owners have a common interest in the principle involved in the litigation, that it is impossible to bring all before the court, and that the action is brought in behalf of the plaintiff and all others alike interested.

The defendants make four contentions in support of their appeal:

(1) That the plaintiff has a remedy at law, and so injunction will not lie.

(2) That the plaintiff cannot have an injunction since he did not pay before suit the portion of the tax found to be legal.

(3) That chapter 454, p. 697, Laws 1921, authorizing the imposition of a wheelage tax, is so indefinite and uncertain that it cannot be enforced.

(4) That chapter 454 is unconstitutional because of the exemption from the wheelage tax of vehicles used solely for the purpose of selling or peddling the products of a farm or garden occupied and cultivated by the owner of the vehicle, and that being unconstitutional the Duluth ordinance is unaffected by it and is therefore in force.

1. The defendants urge that the complaint is without equity because the owner has adequate remedies at law. He may submit to an arrest and a criminal prosecution and assert the invalidity of the tax, or after arrest may test the ordinance on habeas corpus. Every day's use of his auto, during the pendency of the proceeding, is a separate offense. This is an unsatisfactory remedy. The defendants do not urge it much, but mostly insist that the owner may pay under protest and maintain an action to recover, and that this affords an adequate remedy. This is their real contention. It was the point of greatest difficulty to the trial court. We have found it so. The question is not of much practical importance to the parties, but its determination makes a precedent.

The authorities substantially agree that an injunction will not issue to restrain a tax for mere irregularities or informalities in its imposition. Courts hesitate to interfere with taxing officers in the collection of public revenue. The cases are at hopeless variance and much con-

fused on the question whether an injunction will issue at the suit of an individual taxpayer to restrain a tax which is illegal or without authority of law, solely on that ground, and without other basis for the interposition of equity. Some hold that it will. Security Sav. Bank v. Carroll, 131 Iowa, 605, 109 N. W. 212; Overall v. Ruenzi, 67 Mo. 203; St. Louis R. Co. v. Apperson, 97 Mo. 300, 10 S. W. 478; Appeal of Conners, 103 Pa. 356; Hoy v. Kuhn, 295 Ill. 33, 128 N. E. 829; Turkey Knob Coal Co. v. Hallanan, 84 W. Va. 402, 99 S. E. 849.

Our court, following the apparent weight of authority, is opposed to such holding. An early case is Clarke v. Ganz, 21 Minn. 387, involving a personal property tax. It was followed in Bradish v. Lucken, 38 Minn. 186, 36 N. W. 454, and Laird, Norton Co. v. County of Pine, 72 Minn. 409, 75 N. W. 723. In none of these was there present a recognized ground for equitable interference, unless the illegality of the tax is such. An injunction was denied in Albrecht v. City of St. Paul, 47 Minn. 531, 50 N. W. 608, and Fajder v. Village of Aitkin, 87 Minn. 445, 92 N. W. 332, 934. These cases involved assessments for local improvements. The lotowner was afforded a convenient opportunity for defense in the proceeding and this was sufficient.

Some courts, in determining whether there is jurisdiction in equity, refer to the avoidance of a multiplicity of suits and the cluttering of the courts with numerous pieces of litigation, involving a single principle, which might be settled in one suit, the principle involved being one in which all similarly situated have a community of interest, though their property interests are distinct and separate.

The general rule is that the plaintiff who will not be subjected to numerous suits cannot state a cause of action in equity based upon the ground that the defendant will be saved a multiplicity of suits. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682. But, in determining the propriety of proceeding by injunction, courts have referred to the multiplication of litigation as proper for consideration. Thus, in Drainage Commissioners v. Kinney, 233 Ill. 67, 84 S. E. 34, while recognizing that there was a legal remedy by an action to recover, the court said (p. 72):

"But where the tax is unauthorized by law we have held that it was the duty of a court of equity to interfere, especially when the recovery of the tax would necessitate a multiplicity of suits."

In Clee v. Sanders, 74 Mich. 692, 42 N. W. 154, an action to restrain the enforcement of a tax, the court said that "the various parties aggrieved are allowed to sue together, although not jointly interested. for the express purpose of avoiding multiplied suits, and having the controversy settled as far as may be in one hearing."

In Carlton v. Newman, 77 Me. 408, 1 Atl. 194, where the validity of an entire school district tax was involved, the court, while holding to the general rule as to the adequacy of a legal remedy, said (p. 411):

"But we are of opinion that when it appears that an entire school district tax is illegal because assessed without authority of law, a bill to enjoin its collection brought by all of the tax payers of the district jointly on whose polls and estates the tax has been assessed, or by any number thereof on behalf of themselves and all the others similarly situated, may be sustained upon the ground of the inherent jurisdiction of equity to interpose for the purpose of preventing a multiplicity of suits; that although each tax payer has some legal remedy, it is grossly inadequate when compared with the comprehensive and complete relief afforded by a single decree."

In Ranney v. Bader, 67 Mo. 476, the court said that "equity will maintain jurisdiction to prevent multiplicity of suits, and no stronger case could be put for entertaining jurisdiction under this rule, than is presented, when one tax payer for himself and all other tax payers of a township or county, similarly interested, brings his bill, asking the chancellor to put forth restraining process to prevent the imposition and collection of an unauthorized tax, and thus settle in one suit, what it would take hundreds and, perhaps, thousands to do, if such relief were denied, and the parties subjected to the payment of such tax were driven, each one, to his action at law for redress." So, in City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L.R.A. 408, 67 Am. St. 224, the court, in enjoining the enforcement of a "wheel tax" ordinance at the suit of a number of interested parties, and for the benefit of

those similarly situated, where the city claimed that the complainants should pay the tax and resort to legal actions to recover, said (pp. 452, 453):

"Many cases undoubtedly exist where equity will interfere to protect an invasion of property rights where the remedy at law is not entirely adequate, and where peculiar difficulties intervene the jurisdiction will be upheld. In the present case three hundred seventy-three complainants have filed their bill for relief. Their grievance is precisely the same and arises from the same cause. The various parties * * * sue together for the express purpose of avoiding a multiplicity of suits and to have the controversy settled in one hearing." * * *

"No inflexible rule can be laid down for the determination of the question as to whether jurisdiction exists in a court of equity. In general, an adequate legal remedy will suffice to make such courts hesitate in acting. But inadequacy in granting relief for the determination of a right may arise from causes other than mere forms of remedy, and it will not do to sacrifice justice on the mere ground of the form of the remedy, where convincing facts show that adequate relief can best be had in the forum of a court of equity. In this case" three hundred and seventy three "complainants present facts showing that between 200,000 and 300,000 citizens and taxpayers are affected by the provisions of the ordinance, and if compelled to pay the illegal tax, hardship and injustice will result to an enormous number of persons. If they pay the tax and are compelled to resort to a court of law to recover back the amount so paid, the business of the courts will be obstructed by a number of actions of the same character. Long delay will ensue, and the costs to the persons so paying such illegal tax or license fee will be greater than the amount to be recovered. Under any circumstances, if the license exacted is illegal it would amount to oppression and injustice to a large part of the population of the city of Chicago, and this bill presents a case for the jurisdiction of a court of equity."

And in Greedup v. Franklin County, 30 Ark. 101, in referring to a remedy at law by actions to recover back the court said (p. 110):

"What a multiplicity of suits at law must be brought, in order to get

redress for an injury which it is proposed to stop in a single suit in equity; we have no means of ascertaining the number of tax payers in Franklin county, but may suppose they exceed two thousand. Of these perhaps five hundred may be able to assert their rights at law, whilst fifteen hundred, who pay less tax, are in moderate circumstances or too poor to employ counsel to stop the payment of an erroneous tax ten times less than it would cost to employ counsel to prosecute their suit. The mere suggestion of the situation, if left to redress at law, shows that it in effect would amount to a denial of redress to offer it to them. In such cases chancery will interfere to prevent multiplicity of suits."

In Bradish v. Lucken, 38 Minn. 186, 36 N. W. 454, cited supra, the court said (p. 191) that "an injunction will not issue to restrain the collection of a personal tax where there is a complete remedy at law, solely because there are numerous taxpayers similarly situated, particularly in the absence of any claim that the suit was brought in pursuance of a common understanding, and by the authority of such taxpayers." This case, though the fact may be unimportant, was decided before the statute of 1899, and now embodied in G. S. 1913, § 7674, authorizing one to sue for the benefit of all where the question involved is one of "common or general interest to many persons, or when those who might be made parties are numerous and it is impracticable to bring them all before the court."

Other cases recognize the right of one in a proper case to sue in his own behalf and in behalf of others similarly situated in tax and other controversies. Scribner v. Allen, 12 Minn. 85 (148); Waseca County Bank v. McKenna, 32 Minn. 468, 21 N. W. 556; Laird, Norton Co. v. County of Pine, 72 Minn. 409, 75 N. W. 723; Pencille v. State F. M. H. Ins. Co. 74 Minn. 67, 76 N. W. 1026, 73 Am. St. 326; Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364.

A single individual has a legal remedy by taking out a license and suing to recover the money paid for it. Practically it is worthless. He can more cheaply and with less annoyance pay and submit to the exaction than protest and recover. If there were but a few individuals involved, equity would leave them to their imperfect legal remedies and

let them go largely unredressed. It is only in combination that they can have effective relief. A representative suit, staying prosecutions until the city's right is determined, does the work. Whether relief should be given in equity, is not a question of power or of substantive law, but of right procedure. A court of equity can assume jurisdiction without usurpation. It does the city no wrong. No right to jury trial is involved. Whether the issue is tried at law or in equity, the questions are wholly of law. Indeed, the city might well enough welcome a settlement in one speedy suit. Under our present practice the hearing on appeal from an injunctional order can be had without delay and a speedy result reached. If the suggestion is made that such has not been the result in this case, the answer is that the delay has been because of the controversy over procedure, now settled, never of considerable moment to either party, but important enough as establishing a precedent to demand deliberation.

Limiting what we say to the concrete case before us, we hold that where as here an ordinance of a city imposes an unauthorized and illegal tax, which affects in the same way a large number of its residents, who have a community of interest in the controlling principle involved, the decision of which will determine their separate property rights, the method of enforcement of the ordinance being drastic, the legal relief afforded to an individual being attended with expense out of proportion to the amount involved and practically not worth pursuing, but in combination relief in equity being complete, a representative action may be maintained by one or more aggrieved persons in behalf of themselves and others similarly situated and appropriate relief by injunction may be given.

In reaching this conclusion we have not failed to note a line of cases, of which Tribette v. Illinois Cent. R. Co. 70 Miss. 182, 12 South. 32, 19 L.R.A. 660, 35 Am. St. 642; Roanoke Guano Co. v. Saunders, 173 Ala. 347, 56 South. 198, 35 L.R.A.(N.S.) 491, and Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47, may be taken as typical. Such cases involve a situation where a number of actions are brought against one party, who seeks relief in equity from numerous suits, and

hold that equity will not interfere because of a community of interest in the principle of law involved, unless there is in addition a community of interest in the subject matter of the litigation, and they criticize certain textbook statements, seeming not to make essential a community of interest in the subject matter, as erroneous. With the application of the rule and the result reached in those cases, there is no quarrel.

2. The defendants contend that the plaintiffs can have no relief until they pay the valid portion of the tax. When a taxpayer, unlawfully assessed, asks equity as to a tax alleged to be illegal, he must do equity by paying such portion of the tax as is legal. The principle is unquestioned. Here the plaintiff contended that the tax was wholly unauthorized upon the ground that, after the passage of chapter 454, p. 697, Laws 1921, pursuant to the constitutional amendment of 1920, the Duluth ordinance was without validity. His contention was that all wheelage tax legislation must look to the 1921 act for its authority. The claim was in good faith. Forceful arguments can be made in support of it. This is not a case where a portion of the tax is confessedly legal. The defendants should not be permitted to prevail as to the tax upon which they wrongfully insist because the plaintiff, though acting in good faith and on reasonable and plausible grounds, has failed to get all the relief he asked. Perhaps the trial court, if requested, would have made the granting of the injunction conditional upon the payment of the tax found legally due. The state value tax and the Duluth horse power and tonnage tax do not work well together, and municipal legislation seems desirable, though the present ordinance be held effective—a matter not necessary for decision now.

3. The defendants contend that the first subdivision of section 1 of chapter 454, hereinbefore quoted, is so indefinite and uncertain that nothing can be made of it. The part of it to which objection is made provides that no wheelage tax "shall exceed a sum equal to twenty per cent tax imposed by the state in lieu of all other taxes," etc. The specific claim is that the words "twenty per cent tax" can be given no meaning. If the words were "twenty per cent of the tax" or "twenty

per cent of tax" the claim would not be made. The state tax is a 2 per cent tax. Laws 1921, p. 710, c. 461, § 3. The act fixing it was passed on the same day as chapter 454. There is no 20 per cent tax imposed by the state.

The claim is without merit. There is a grammatical error. Everyone who notes the error sees the meaning. Many see the meaning without noting the error. The legislature intended that the wheelage tax should not exceed 20 per cent of the state lieu tax.

4. It is claimed by the defendants that subdivision 3 of section 1, c. 454, renders the act unconstitutional, and so the Duluth ordinance remains effective and unlimited by the statute. Subdivision 3 exempts vehicles used for the purpose of selling or peddling the products of farm or garden, occupied and cultivated by the owner of the vehicle. The claim is that this is unconstitutional class legislation and in effect an attempt by the legislature to accomplish something similar to what the people accomplished when they adopted article 1, § 18, of the Constitution relative to peddling the products of farm or garden without a license. A good argument can be made in support of the claim that subdivision 3 is unconstitutional. State v. Wagener, 69 Minn. 206, 72 N. W. 67, 38 L.R.A. 677, 65 Am. St. 565; State v. Parr, 109 Minn. 147, 123 N. W. 408, 134 Am. St. 759. But suppose it is unconstitutional. It is an unimportant part of the statute. Compared with the total autos in use those excepted are negligible in number. The exemption is not so important nor is it so connected in subject or purpose with the other portions of the statute that the legislature would not have passed the statute if subdivision 3 must be omitted. If subdivision 3 falls, and we are not concerned with its future now, chapter 454 is still a working and constitutional law. 3 Dunnell, Minn. Dig. § 8936.

Some objection is made to subdivision 2, but it is not of such importance as to call for consideration now.

Orders affirmed.

JOHN G. WALLACE v. PINE TREE LUMBER COMPANY AND ANOTHER.

PINE TREE MANUFACTURING COMPANY, APPELLANT.[1]

December 2, 1921.

No. 22,399.

Log driving by independent contractors — defendant not liable.

Plaintiff was driving timber on the Mississippi river between Lake Itasca and Lake Irving, while defendant's logs were being driven by Connor & Wilson under a written contract with defendant. Plaintiff recovered a verdict against defendant because of alleged wrongful use of the waters of the river. It is *held*:

(1) That the written contract under which the driving was done discloses that Connor & Wilson were independent contractors, and that there is no evidence warranting a finding that the contract does not express the true relation between the parties.

(2) No facts or circumstances were shown from which an inference would be permissible that defendant assumed control over the use of the dams and waters by which the logs were transported, or gave Connor & Wilson any orders or directions with reference thereto.

(3) Liability could not be created on the theory that the work let to Connor & Wilson could not be done without causing injury or damage to plaintiff, for the river could be properly used by any one for transporting logs and timber products.

Action in the district court for Morrison county to recover $20,372 damages for interference with the waters of the Mississippi river by means of certain dams. The answer alleged that the Mississippi river was a navigable river and waterway. The case was tried before Roeser, J., who when plaintiff rested and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $6,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed with directions.

[1]Reported in 185 N. W. 500.

E. E. McDonald, A. H. Vernon and *Clapp & Macartney,* for appellant.

Marshall A. Spooner and *Elmer A. Kling,* for respondent.

HOLT, J.

Plaintiff in the spring of 1919 was driving logs, ties and pulpwood on the Mississippi river between Lake Itasca and Lake Irving, near Bemidji. He brought this action to recover damages on account of the wrongful interference by defendant with the waters of the river by means of the operation of certain dams, while its logs were driven behind plaintiff's. He recovered a verdict of $6,000. Defendant appeals from the order denying its motion for judgment notwithstanding the verdict or a new trial.

The defendant is a corporation engaged in the manufacture and sale of lumber. It has for years operated a sawmill at Little Falls, and secured timber and logs from 1915 to 1919, in part, from Itasca State Park and adjoining territory. In 1915 a contract was made with Connor & Wilson, a logging firm, to cut and deliver the logs on board of cars at Lake Irving. At the expiration of that contract, and on August 22, 1918, defendant again made a contract with Connor & Wilson, by which the latter agreed to cut, haul, drive and deliver loaded on cars, at Lake Irving, all the pine, spruce, tamarack and other timber suitable for mercantile sawlogs which defendant should mark or designate to be cut on certain described lands.

The contract is very lengthy and specific. Connor & Wilson agreed to cut all timber marked by defendant that will make sawlogs acceptable to it; to cut all timber where it is smooth to 6 inches at the top; to cut all logs, where timber is not broken, into lengths from 12 feet upward, and as long as might be directed by defendant; the logs were to be square butted, well trimmed, and cut in a good and workmanlike manner and to the entire satisfaction of defendant; the logs cut were to be banked on Itasca and Elk lakes and driven to Lake Irving during the driving season following the cutting and hauling, and there loaded on cars on a spur track of designated size to be constructed by Conner & Wilson at their expense, except they were not to furnish the rails and

anglebars; Connor & Wilson were to construct and maintain, at their own expense, all dams and other improvements required for the driving of said logs to where the same were to be loaded, and were to pay all damage for overflow and all other charges of whatsoever nature in securing, raising or maintaining a head of water on Lake Itasca, and all other lakes and streams required for driving the logs; the minimum to be loaded on a car was to be designated by defendant, but such minimum should not exceed 6,600 feet; Connor & Wilson were to burn slashings to the satisfaction of the state authorities, and were to pay for suitable sawlogs left standing, lying or being on any of the lands to be cut or on any logging road at the rate of $11 per M feet, and the same for logs left along streams and lakes, except dead heads or sunken logs; Connor & Wilson were to board in their camps free of charge agents appointed by defendant to look after its interests under the contract. For the work to be performed by Connor & Wilson, defendant agreed to pay them $11 per M feet, at certain specified times for the logs cut, driven and loaded under the contract, and defendant was to furnish or cause to be furnished the rails and anglebars for the spur track mentioned, to equip the cars upon which the logs were to be loaded, but was not to be responsible for the delays or shortage of cars by the railroad company.

It was mutually agreed that Connor & Wilson should cut all the logs designated, and drive and load them as early as possible during the driving season of 1919; the logs were to be scaled on the landing where banked by competent scalers agreed on, each to pay half the wages of the scalers, but Connor & Wilson were to board them free, or, at the request of either party, the surveyor general of the district might scale the logs; Connor & Wilson agreed to deliver the logs free of liens; should Connor & Wilson fail or neglect to perform the conditions of the contract, then defendant in its discretion might take possession of the logs and of the property of Connor & Wilson used in the work, and complete the contract, and the reasonable expense of so doing to be paid by Connor & Wilson; if defendant purchased additional timber adjoining the lands to be cut, Connor & Wilson were to log the same in the manner and for the price stipulated for the timber on the lands de-

scribed in the contract; Connor & Wilson were to open and keep separate accounts on their books, showing the disbursements and liabilities on all matters relating to operations under the contract, and showing the actual cost of the logging operation, the accounts to be at all times open to the inspection of the auditor of defendant, so that it might be advised of the actual conditions when payments are to be made to Connor & Wilson and for other purposes, and lastly that should Connor & Wilson faithfully perform the obligations resting upon them within the time specified, they were to have an additional payment of one dollar per thousand feet, when the work was so completed.

Under this contract Connor & Wilson cut and had banked on Elk and Itasca lakes over 9 million feet of logs by the middle of April, 1919, some 5 million thereof being in or on Elk lake, which opens into Itasca by a creek a few rods in length. Upon this creek was a sluice dam, by which the waters in Elk lake could be held back and raised above those in Itasca. The outlet of Itasca lake is the Mississippi river, and across the river about a quarter of a mile from the lake is a dam, with gates and sluiceway. Ten or twelve miles below is another dam, by which waters can be accumulated so as to float logs over the 5 mile rapids below, called Phelps Rapids. Some 10 or 15 miles further down LaSalle river, the outlet of LaSalle lake comes in. There was a dam at the outlet of the last named lakes by which a 9 foot head of water could be accumulated. The dam at the outlet of Lake Itasca, is under the control of the state forestry board, the one at LaSalle appears to be owned by one Busch. Connor & Wilson, in the fall of 1918, made arrangement for a permit from the forestry board to raise the water in Itasca, and purchased from Busch the right to fill the LaSalle lake to the capacity of the dam. Both were filled to overflowing prior to April 1, 1919. Plaintiff had about 180,000 feet of small timber strung along the Mississippi above the outlet of LaSalle river. He had nearly 3,000,000 feet banked below that outlet. His principal claim is that he was not given sufficient water to move the 180,000 feet he had above LaSalle river, before Connor & Wilson began sluicing defendant's logs. Plaintiff began driving April 13, and Connor & Wilson, April 29. Connor

& Wilson's drive came upon plaintiff's rear in the middle of Phelp's Rapids.

The chief contention of defendant is that whatever was done in respect to driving its timber was done by Connor & Wilson, independent contractors, for whose acts defendant is not responsible. The contract between Connor & Wilson and defendant is drawn with care and is clear and specific in its terms. From it the court must determine the relation of the parties, unless there be evidence that it is a mere ruse, or that defendant did in fact assume direction of the matters complained of and that Connor & Wilson therein acted as defendant's agents or servants. Plaintiff was not concluded by the written document, not being a party to it. But we have examined the record with care, and do not find any testimony from which the inference would be permissible that the written instrument was not a bona fide agreement of the parties and the sole criterion of their obligations. There is not a particle of evidence tending to show Connor & Wilson to be irresponsible parties to serve as scapegoats for defendant. There is no intimation that they received or were to receive help or credit extensions from defendant while doing the work. They evidently were provided with the necessary tools and camping outfits, bought and paid for the provisions needed, hired and paid the men without any aid from defendant, except as derived from the payments stipulated in the contract.

Construing the contract itself in the light of the surrounding circumstances most favorable to plaintiff, neither court nor jury is warranted in reaching any other conclusion than that Connor & Wilson, in the driving of defendant's logs, were independent contractors. The supervision provided for in the contract, merely is to assure certain results, and does not tend to control the manner or means of reaching such results. To that end were the provisions that the logs cut should be banked on the lakes from which they could be floated to destination; that the trees to be cut and the lengths into which they were to be cut should be designated, and that agents of defendant might examine the books to ascertain that the results contracted for were being accomplished. There is no provision looking toward a direction by defend-

ant as to how the driving of the logs should be done, or how the necessary water was to be provided. On the other hand, Connor & Wilson expressly undertook to do that at their own expense.

In Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45, this rule from Shearman & Redfield on Negligence (4th ed.) § 164, is applied and approved: "The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." In the Barg case the decision turned upon contradictory testimony of defendant as to control of the work and the means to accomplish the result.

In Rait v. New England F. & C. Co. 66 Minn. 76, 68 N. W. 729, it is said: "In every case the decisive question in determining whether the doctrine of respondeat superior applies is, had the defendant the right to control in the given particular the conduct of the person doing the wrong? If he had, he is liable. On this question the contract under which the work was done must speak conclusively, in every case reference being had, of course, to surrounding circumstances." At the time the wrong herein complained of took place, defendant had no right to interfere with Connor & Wilson's manner of driving or use of the river. They were not in default so that defendant could have assumed control. They had the logs cut and banked, and had provided for the water needed to drive them.

Klages v. Gillette-Herzog Mnfg. Co. 86 Minn. 458, 90 N. W. 1116, relied on by respondent, turned on the point that the evidence revealed that the contract relied on did not disclose the true relation of the parties. There is no testimony justifying such conclusion here.

Brown v. Douglas Lumber Co. 113 Minn. 67, 129 N. W. 161, was decided on the proposition that the mill, in which the injury happened, was furnished by the defendant, and the manner of using it was to some extent under its control. State v. District Court of St. Louis County, 128 Minn. 43, 150 N. W. 211, was a compensation case, where the workman instead of wages was paid by the piece.

The question remains whether there are any attending circumstances, under the decisions stated, which would allow a jury to find that the contract does not express the true relation of the parties, or that Connor & Wilson yielded their rights thereunder and became the mere agents or servants of defendant. The fact that defendant was very anxious to get these logs cut and loaded on the railroad cars as early as possible in the spring of 1919, and that it took all precaution to have this accomplished and the work well done, cannot be permitted as proof that the relation between the parties was other than disclosed by the contract. Nor can the fact that it was understood that the logs were to be floated down the river, and that this ordinarily could not be done except water was accumulated and controlled by means of the dams mentioned, be a circumstance tending to prove a relation of master and servant between defendant and Conner & Wilson. There is nothing else in the record, except certain alleged admissions of an agent of defendant, hereinafter to be noted, that indicates the slightest effort on the part of defendant to control or interfere with that part of the work which Connor & Wilson was to perform without defendant's specified direction. There was nothing specified as to the means and manner in which the logs were to be driven. This contract, drawn with care and specific as to the obligation of both parties, running over almost a year, and involving work and labor to the amount of about $100,000, must be taken as conclusively establishing the relation of Connor & Wilson as independent contractors in the absence of some positive or substantial testimony pointing to the contrary.

The only other matter upon which plaintiff claims a right to go to the jury is this: Hinkle, a managing agent of defendant, was at Lake Itasca, once in January, 1919. Again, on May 27, 1919, he and two officers of defendant took an automobile trip along the river and noted the conditions of the drive. On the last named trip, Hinkle, evidently doubting the presence of the number of men asserted to be on plaintiff's drive, asked to see his time books. After looking at these, it is claimed, Hinkle said, in substance, that if he had known that plaintiff had so many men he, Hinkle, would have ordered more water released. There was evidence that in the middle of April when plaintiff requested some

water to move his logs over Phelps Rapids, the man placed in charge of the Itasca Lake dam, on the order of Wilson, took off some boards on the dam, and increased the flow. Indeed, he never refused water when requested by plaintiff, but the complaint is that it was not released in adequate quantity and at proper times.

Even if Hinkle made the statement attributed to him, it does not tend to prove the relation of master and servant between defendant and Connor & Wilson. It was at most a casual remark made after the alleged wrong had been committed, and could hardly serve as an admission binding on defendant. It might well be that if plaintiff, when he needed water, had appealed to defendant, the latter could have prevailed on Connor & Wilson to release more than what they did. But that does not tend to prove that either Hinkle or defendant had in fact exercised any control over Connor & Wilson in respect to the waters they had accumulated. The evidence fell far short of indicating the existence of any fact or circumstance tending to prove that defendant had given any direction as to how the water was to be accumulated, held or released in the dams, or that it was its duty or within its power so to do.

It is true that, notwithstanding Connor & Wilson were independent contractors, defendant might nevertheless become liable for their torts committed at its behest or direction. But, as stated, the record contains no basis for finding that defendant did anything of the sort, or ever exercised any authority over the use of the waters in question.

The only other possible theory, upon which to ground a liability against defendant for what Connor & Wilson did in driving these logs, would be that the work contracted for could not be done without wrongfully interfering with plaintiff's use of the river. But there is no basis in the record for a recovery upon such ground. Plaintiff as well as Connor & Wilson depended on the waters of the lakes and river to float their timber. Each had a right to the use thereof for such purpose, so long as the like right of others was not unreasonably interfered with. There is nothing indicating that defendant's logs could not have been driven without doing injury to plaintiff or impeding him in the transportation of the timber he had in charge. The Viken dam was abso-

lutely necessary in order to float any timber over Phelps Rapids. Both Connor & Wilson and plaintiff were dependent upon its use. It could be used properly to facilitate driving. So could the dams controlling the outlet of Elk, Itasca and LaSalle lakes. That more water was accumulated by the dam at the outlet of Itasca lake than the permit of the state forestry board authorized, could not have harmed plaintiff, for the overflow was of the same volume as if there had been no dam when plaintiff began driving, and an excess accumulation of water, if anything, would benefit him as well as Connor & Wilson. The same would be true of the dams at the outlets of Elk and LaSalle lakes. The waters accumulated by these dams during the winter and held after the dams were filled, could not have impeded or destroyed plaintiff's proper use of the river, for, as already stated, the overflow was then the same as if no water were held back by dams. Indeed, without the use of such dams neither plaintiff nor Connor & Wilson could have driven any timber on the river to advantage. With the dams there and properly managed, logs and timber could be lawfully transported on the river. There can, therefore, be no valid contention that defendant contracted for something that could not be accomplished without wronging plaintiff. Our conclusion is that defendant's motion for judgment notwithstanding should have been granted.

The order is reversed with direction to enter judgment in favor of defendant notwithstanding the verdict.

CHARLES F. LEWIS AND E. C. REBMAN v. C. S. BABCOCK.[1]

December 2, 1921.

No. 22,512.

Mortgage — holder of contract of sale necessary party.

Action by one holding a recorded deed to land to clear the record of a mortgage given before but recorded after plaintiffs' deed. Defendant alleges that plaintiffs' deed and a contemporaneous contract of sale to

[1]Reported in 185 N. W. 384.

the grantor in the deed together constitute a mortgage. *Held*, that for the determination of that issue, the holder of said contract should be joined as a party.

Action in the district court for Mower county to cancel a real estate mortgage. The facts are fully stated in the opinion. From an order, Catherwood, J., granting his motion to dismiss C. S. Babcock as a party and setting aside the order of April 27, 1921, making him an additional party to the action and requiring him to reply to defendant's answer, C. S. Babcock appealed. Reversed.

Hoffman & Richardson, for appellant.

Sasse & French, for respondent.

HALLAM, J.

Plaintiffs sued to cancel a real estate mortgage for $2,300, held by defendant upon land in Mower county. In their complaint they allege that they became owners of the land through a deed from Anna Steinkuehler, duly recorded; that the deed recited that it was subject to a mortgage for $9,000 and another for $7,680 running to plaintiff; that defendant's mortgage was dated before but not recorded until after plaintiffs' deed; that, in reliance on the record, plaintiffs satisfied the $7,680 mortgage; that plaintiffs were purchasers in good faith for value without notice of defendant's mortgage and that said mortgage is therefore subordinate to their rights and they ask to have the record thereof canceled.

Defendant answers, alleging among other things that Steinkuehler was unable to pay her interest and taxes and plaintiffs advanced her money for that purpose, and, as part of one and the same transaction, Steinkuehler deeded the land to plaintiffs and plaintiffs released their mortgage and gave her a contract to reconvey on payment of the whole amount due, that is, the $7,680 and the money newly advanced, and that the deed from Steinkuehler to plaintiffs and the contract back from plaintiffs to Steinkuehler in fact constituted a mortgage. Defendant further alleges that on April 7, 1920, Steinkuehler transferred her interest in said contract of sale to C. S. Babcock, who had notice of de-

fendant's mortgage and that C. S. Babcock is now the owner of said interest. Defendant then alleges that his mortgage is still a lien upon the land subject to the $9,000 mortgage and to the alleged mortgage held by plaintiffs. Other matters are alleged which pertain only to controversies existing between defendant and C. S. Babcock.

Defendant then asks that C. S. Babcock be made a party and be required to answer herein. The court by ex parte order required C. S. Babcock to appear and reply to the answer of defendant. Thereupon C. S. Babcock appeared and moved that said ex parte order be vacated and the court so ordered and ordered C. S. Babcock dismissed as a party. From this order defendant appeals.

We are of the opinion that C. S. Babcock was properly made a party and that it was error to dismiss him. The statute which authorizes the bringing in of an additional party reads as follows:

"Whenever it shall be made to appear, upon motion of the plaintiff in any pending action, or of any defendant in such action who has alleged a counterclaim or other ground for affirmative relief, that in order to a full determination of such action another should have been made a party defendant or plaintiff therein, the court, upon such terms as may be proper, shall order such additional party to be brought in." G. S. 1913, § 7690.

Under this statute an additional party should be brought in "when it is necessary to do so to secure a full determination of the controversy between the original parties tendered by the complaint, answer or counterclaim." Clay County Land Co. v. Alcox, 88 Minn. 4, 92 N. W. 464.

Plaintiffs' counsel in their brief say "the only issue upon plaintiffs' complaint is as to whether or not they are the owners in fee" of this land. If not the only issue, this is at least the major issue, for, if plaintiffs are only mortgagees, then of course defendant's mortgage is a subsisting lien. The question at issue between plaintiffs and defendant then is whether the deed from Steinkuehler to plaintiffs and the contract back from plaintiffs to Steinkuehler in fact constituted a mortgage. It seems to us that to secure a full determination of that con-

troversy, both parties to the alleged mortgage should be before the court. Otherwise two actions may be necessary, one against the alleged mortgagee and another against the alleged mortgagor to determine the nature of the transaction between them. Steinkuehler, having assigned her interest in the contract to C. S. Babcock, her presence is no longer required but that of her assignee is.

This decision is in harmony with the authorities.

In 2 Jones, Mortgages, § 1097, it is said that, in an action to declare an absolute deed a mortgage, all persons who have an interest in the mortgage or in the equity of redemption should be made parties.

In Dias v. Merle, 4 Paige Ch. (N. Y.) 259, it was held that in an action between parties claiming rights under a lease, to have the lease declared a mortgage, the lessor as well as the lessee, should be a party. Cited with approval in Winslow v. Clark, 47 N. Y. 261.

Other cases are illustrative.

In Crosby v. Scott-Graff Lumber Co. 93 Minn. 475, 101 N. W. 610, defendant counterclaimed in a suit for breach of a building contract, claiming a lien on the land for work and materials. It was held that defendant had the right to have plaintiff's wife who owned the land made a party.

In Swenson v. Split Rock Civil Tp. 39 S. Dak. 131, 163 N. W. 563, it was held that, in an action involving the location of a section line, property owners on each side of the line affected should be made parties.

The principle applicable here was well stated in Johnson v. Robinson, 20 Minn. 153 (170), an action to remove a cloud, in which it was held that a grantee pendente lite of the defendant should be made a party. The court said: "In holding him (the grantee) to be a necessary party the court below followed the established and characteristic rule of courts of equity, the constant aim of which is to do complete justice by settling the rights of all persons interested in the subject of the suit, and so among other objects, to prevent future litigation."

We may add that there is no propriety in trying, in this action, controversies between defendant and C. S. Babcock which are personal to

themselves. C. S. Babcock is properly made a party only for the full determination of the controversy above referred to which is at issue between plaintiffs and defendant.

Order reversed.

JULIA OUTCELT, AS ADMINISTRATRIX OF THE ESTATE OF CLARENCE R. OUTCELT, DECEASED v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, AND JOHN BARTON PAYNE, GOVERNMENT AGENT.[1]

December 2, 1921.

Nos. 22,430, 22,431.

Death — proof of cause by circumstantial evidence.

1. In a death case the causal connection between the negligence charged and the injury suffered may be established by circumstantial evidence. It was so established in this case.

Assumption of risk by servant — question for jury.

2. To be charged with the assumption of a risk, it is not enough to show that a servant was aware of the existence of a defect or danger. He must also have actually or constructively known and appreciated the risks to which he was exposed. The evidence made the question one of fact for the jury.

When servant is negligent in selecting dangerous way in which to work.

3. As a general rule, when a danger is obvious and of such a nature that it can be appreciated and a servant is permitted to do his work in his own way, he is negligent as a matter of law if he selects a dangerous way when a safe one is available and he has knowledge, actual or constructive, that the way he selects is dangerous. The evidence did not bring this case within the rule.

New trial — failure to instruct jury in absence of request.

4. The failure of the trial court to instruct on a particular point is not ground for a new trial in the absence of a request for an instruction covering it.

[1]Reported in 185 N. W. 495.

Railroad — government agent sole defendant.

5. The action should have been dismissed as to the railroad company and the director general, and only the government agent under the transportation act retained as defendant.

Action in the district court for Ramsey county to recover $25,000 for the death of plaintiff's intestate. The answer alleged that all the physical conditions surrounding and attendant upon the work being done by plaintiff's intestate at the time of the accident were patent and observable and known to and understood by the deceased. The case was tried before Haupt, J., who at the close of the testimony denied defendant's motion for a directed verdict and a jury which returned a verdict in favor of plaintiff apportioned as set out in the first paragraph of the opinion. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, the railroad company and director general appealed. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, John Barton Payne, Government Agent, appealed. Affirmed on appeal of government agent and reversed on appeal of railroad company and director general.

Barrows & Metcalf, for appellants.

Barton & Kinkead, for respondent.

LEES, C.

Plaintiff's intestate was the head brakeman on a freight train of the Chicago, Burlington & Quincy Railroad Company. He lost his life in an accident in the railroad yards at Grand Crossing, Wisconsin, on the evening of January 10, 1920. Alleging that the deceased was employed in interstate commerce, plaintiff, who is his widow and administratrix, brought this action to recover the pecuniary loss she and her two children sustained by reason of his death. She recovered a verdict against all of the defendants, apportioning damages as follows: $13,000 to the widow and $1,000 to each of the children. The railroad company and the director general joined in a motion for a judgment of dismissal

notwithstanding the verdict or for a new trial, basing their motion on the proposition that only the agent designated by the president under the Transportation Act of February, 1920, could be held to respond in damages. The motion was denied and they appealed. The agent who is referred to in the pleadings as government agent moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was also denied and he appealed. Both appeals were heard and submitted at the same time. We dispose of the appeal of the government agent first.

The end of the run of the train on which the deceased worked was at Grand Crossing. In the yard where it was to be placed for the night, there were 12 sidetracks. The train, consisting of 17 cars, was to be left on track No. 5. The engine stopped near the switch connecting this track with the lead track, and the deceased got out of the engine cab where he had been riding, threw the switch and gave the signal to come ahead. The fireman testified that when, in response to the signal, the engine came up to the switch he saw the deceased standing beside it and that he was still there when the engine had run about three car-lengths in on track No. 5. Deceased was not again seen alive. It was the duty of the head brakeman to receive a signal from the rear of the train when it had passed in on the sidetrack far enough to be in the clear and to uncouple the engine so it might be run into the roundhouse. The signal could be received by a brakeman stationed on top of a freight car or in the gangway between the engine and tender, and possibly from the side of a car or of the tender. On the night of the accident it was received by the engineer, for the deceased was not on the train when it was brought to a stop.

Soon after the train was left on track No. 5, two inspectors proceeded to examine the cars, beginning at the end of the train nearest the switch and proceeding north on opposite sides of the track. Track No. 6 was west of and adjacent to track 5. A refrigerator car stood on this track 600 or 700 feet north of the switch to track 5. When the inspector on the west side of the track came to a point opposite the refrigerator car, he discovered a cap lying on the ground. A few feet farther

north he found a lantern, and a little farther on the body of the deceased. There were indications in the snow between the tracks and where the cap and lantern were found that someone had fallen to the ground, and from there to the place where the body lay there were marks indicating that some object had been dragged in the snow. The body lay between tracks 5 and 6 and about five car-lengths from the front car in the train. It lay face down with the head to the north and the feet to the south. The coat worn by deceased had been pulled up over his head. There was blood on the west rail of track 5 near where the cap was found and also on a wheel of the front truck of the car to which the engine had been attached, and a small piece of bone was found on the truck. At the rear of the tender there was a step or stirrup on either side and horizontal handholds. The complaint was drawn and the case tried on the theory that the deceased was riding on the stirrup on the west side of the tender when it passed the car on track 6 and was brushed off because there was not sufficient clearance.

The sidetracks in the Grand Crossing yards were constructed about 17 years ago. They were so laid that, measuring from center to center of adjoining tracks, the space would be 12 feet. The space between tracks 5 and 6, at the place where the refrigerator car stood, was 11 feet 10½ inches. The space between all the sidetracks varied, running from a maximum of 12 feet 9 inches down to a minimum of 11 feet 9¾ inches, and except for one other place the tracks were nearer together where the refrigerator car stood than anywhere else in the yard. This car extended out over the rails on either side 29 inches, and the tender of the engine 27½ inches, leaving a clearance of only 25 inches between the car and the tender.

It appeared that the deceased was an experienced brakeman and had run in and out of the yard many times. It is conceded that the tracks were so spaced that the deceased could not safely ride on the side of the tender if a car chanced to be standing on an adjoining track. Appellants' contentions are: (1) That the evidence does not show that deceased was riding on the tender at the time of the accident; (2) that he had ample opportunities to see how the tracks were located and knew, or was bound to know, that it was dangerous to ride on the side of an

engine moving about the yard; that there was no occasion for his riding there, and, if he did, he assumed the risks incident thereto.

1. We find in the record sufficient evidence to justify the jury in finding that the deceased was riding on the side of the tender and was knocked off by the car on track 6. Plaintiff might establish her case by circumstantial evidence tending to show a causal connection between the negligence charged and the injury suffered. McNamee v. Hines, supra, page 97, 184 N. W. 675; 2 Dunnell, Minn. Dig. § 7047. The location of the cap, lantern and body, and the blood on the west rail of track 5 and on the front wheel of the car next to the engine, are persuasive evidence that the accident happened in the manner alleged in the complaint. We think the fireman's testimony, already referred to, did not demolish the foundation on which the case rests or overcome the silent testimony of the physical facts.

2. The main contention is that, if the deceased voluntarily selected the side of the tender as the place where he would ride, he assumed all the risks incident to the insufficient clearance between tracks 5 and 6. In Scharenbroich v. St. Cloud F.-W. Co. 59 Minn. 116, 60 N. W. 1093, it was said that the doctrine of assumption of risks is not favored by the courts and ought to be cautiously applied, but, since the question is ordinarily left to the jury, there is little danger of the doctrine being harshly applied against the plaintiff, especially where the defendant happens to be a corporation. By the Federal Employer's Liability Act, as well as by our own, a portion of the doctrine has been pared away, but the facts in this case were such that assumption of risk might still be interposed as a defense.

It is uniformly held that a servant is not charged with the assumption of a risk merely because he is aware of the existence of a danger or defect. To be so charged, he must have known or appreciated, or, in the exercise of ordinary prudence, should have known and appreciated the risks to which he was exposed. Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431; 2 Dunnell, Minn. Dig. § 5970. Whether a servant assumed a given risk, is a question for the jury, unless the evidence is conclusive. 2 Dunnell, Minn. Dig. § 5998. It is urged

that in the instant case it was conclusive, but we are unable to concur in that contention.

It may be conceded that the location of the sidetracks and the space between them must have been perfectly obvious to anyone, and that the deceased, who had run in and out of the yard so many times, must have observed their location and must have known that cars might be standing on any of them at any time. That, however, is not enough to establish conclusively that he had actual or constructive knowledge that it was dangerous to ride on the side of the tender as the engine was running in on one of the tracks. Plaintiff showed by a number of witnesses that in the Grand Crossing yard it was customary for brakemen to ride on the side of the tender or of cars. The yard had been in use for many years. So far as the record shows, the spacing between the tracks had never been changed. It does not appear that there ever had been a similar accident in the yard. If it was customary for brakemen to do what the deceased did on the evening in question, it is fair to assume that the danger of injury was not open and obvious to experienced brakemen, for it is not probable that, with knowledge of the risks they ran, they would follow a practice which endangered their lives. Undoubtedly the danger was ever present, but we think it was a hidden one and that its existence would not be apparent to a man of ordinary prudence, even though he had the experience and opportunities for observation which were possessed by the deceased. The deceased had the right to assume that the railroad company had used due care to provide a reasonably safe place for the doing of his work. The fact that tracks 5 and 6 were so near together that it was dangerous to ride where he rode, was not so patent as to be readily observable, and hence it was for the jury to determine whether he had assumed the risk of the injury which caused his death. Clay v. Chicago, M. & St. P. Ry. Co. 104 Minn. 1, 115 N. W. 949; Koller v. Chicago, St. P. M. & O. Ry. Co. 113 Minn. 173, 129 N. W. 220; McDonald v. Railway Transfer Co. 121 Minn. 273, 141 N. W. 177.

3. But it is contended that, in the discharge of his duties, the deceased was not required to ride on the side of the engine or cars, that there was no necessity for his doing so, and that he voluntarily and un-

necessarily took a position of danger when one of safety was reasonably available, and hence there can be no recovery. The general rule is that, when a danger is obvious and of such a nature that it can be appreciated and a servant is permitted to do his work in his own way, he is negligent as a matter of law if he selects a dangerous way when a safe one is available and he has knowledge, actual or constructive that the way he selects is dangerous. Labatt, Master & Servant (2d ed.) p. 3433; Hoveland v. Chicago, R. I. & Pac. Ry. Co. 110 Minn. 329, 125 N. W. 266; Popplar v. Minneapolis, St. P. & S. S. M. Ry. Co. 121 Minn. 413, 141 N. W. 798, Ann. Cas. 1914D, 383.

This rule apparently relates to the subject of contributory negligence, 2 Dunnell, Minn. Dig. § 6008, and contributory negligence does not bar a recovery in an action brought under the Federal Employer's Liability Act; it merely diminishes damages. The distinctions between contributory negligence and assumption of risks are pointed out in Rase v. Minneapolis, St. P. & S. S. M. Ry. Co. 107 Minn. 260, 120 N. W. 360, 21 L.R.A.(N.S.) 138, and Casey v. Illinois Central R. Co. 134 Minn. 109, 158 N. W. 812. There is much confusion on the subject. It has been well said that attempted distinctions are metaphysical and not practical. 18 R. C. L. p. 674.

Granting that the voluntary selection of a dangerous way of doing work when there is a safe way of doing it, is to be classed as an assumption of the incidental risks, and hence is available as a defense in this action, it must appear that the dangerous way was selected with knowledge, actual or constructive, that it was dangerous. For reasons already stated, whether the deceased had such knowledge was a question for the jury. If there was a rule in force in the Grand Crossing yard, prohibiting brakemen from riding on the side of an engine or car, a different conclusion might be possible, but, on searching the record, we have found no such rule.

4. The final contention is that the trial court erroneously failed to instruct the jury that plaintiff must show that the negligence charged was the proximate cause of her husband's death. The charge might have been more definite in this respect, but a more specific instruction was not requested. It is well settled that the failure of the court to

charge on a particular point is not ground for a new trial in the absence of a request for an instruction covering it. State v. Sailor, 130 Minn. 84, 153 N. W. 271; Clapp v. Minneapolis & St. L. Ry. Co. 33 Minn. 22, 21 N. W. 844; 2 Dunnell, Minn. Dig. § 7179. Three exceptions were taken to the charge. As we read them, they did not amount to a request for an instruction on the point under consideration and did not apprise the court of the alleged omission in the charge.

5. The motion of the railroad company and of the director general was denied before the Supreme Court of the United States decided the case of Missouri Pac. R. Co. v. Ault, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. ed. 647. Under the rulings of this court up to that time, the order of the trial court was correct, but in Borsheim v. Great Northern Ry. Co. 149 Minn. 210, 183 N. W. 519, and, in obedience to the rule announced in the Ault case, prior decisions, holding that a railroad company was a proper party to an action for damages sustained while the railroads were under government control, were overruled. When this action was brought the director general had been succeeded by the agent designated by the president. It would seem, therefore, that the agent was the only proper party defendant, and that both the director general and the railroad company had a right to have the action dismissed. These are purely formal matters not going to the merits of the action or to the ultimate liability of the United States under the provision of the transportation act. Miner v. Payne supra, page 103, 184 N. W. 673. We think the proper practice, in view of the existing situation, is to reverse the order from which these two defendants appealed and to remand the case with directions to enter an order of dismissal as to the railroad company and the director general, and it is so ordered. The motion of the government agent for a new trial was properly denied and that order is affirmed.

STATE v. WORKERS' SOCIALIST PUBLISHING COMPANY, A. A. TOIVENEN AND OTHERS.[1]

December 2, 1921.

No. 22,440.

Insurrection and sedition — Criminal Syndicalism Act of 1917 valid.

1. The criminal syndicalism act of 1917 is not so indefinite as to violate the provision of our Constitution that in any criminal prosecution the accused shall be entitled to know the nature of the accusation against him.

Indictment under the act sufficient.

2. The indictment in this case is sufficiently specific as to the particulars of the crime.

Newspaper article held a violation of the act.

3. An article in a newspaper, stating among other things that capital will never submit without the bloodiest battle history has ever known, and that the workers must learn to fight until the capitalistic class is overthrown and rests blood-stained at the feet of the labor giant, advocates violence as a means of accomplishing industrial ends and is a crime under said statute.

Statute applies to corporations.

4. The act is applicable to corporations.

Intent to advocate not necessary.

5. Intent to advocate is not an ingredient of the offense.

Managing editor may be criminally responsible for unlawful publication.

6. The managing editor of a newspaper is criminally responsible for an unlawful publication made in the paper, unless the unlawful publication is made under such circumstances as to negative any presumption of privity or connivance or want of ordinary precaution on his part to prevent it. It is not a defense to merely show that the editor was not aware of the publication. Under this rule the managing editor was liable criminally in this case.

Business or circulation manager must have notice to be criminally liable.

7. A business or circulation manager, with no editorial duties, is not

[1]Reported in 185 N. W. 931.

criminally liable under the statute, unless he knowingly circulates the paper, that is, circulates it knowing its contents.

Defendants were indicted by the grand jury of St. Louis county charged with the crime of teaching and advocating syndicalism, tried in the district court for that county before Dancer, J., and a jury and found guilty as charged in the indictment. From an order denying their motion for a new trial, Workers' Socialist Publishing Company, A. A. Toivonen and Topias Kekkonen appealed. Affirmed as to defendants publishing company and Kekkonen, and reversed as to defendant Toivonen.

Oliver S. Andresen and *Arthur Lesueur,* for appellants.

Clifford L. Hilton, Attorney General, *James E. Markham,* Assistant Attorney General, and *Warren E. Greene,* County Attorney, for respondent.

HALLAM, J.

Defendants were indicted and convicted under chapter 215, p. 311, Laws 1917, known as the criminal syndicalism act. Defendants appeal.

The language of the statute is as follows: "Any person who by word of mouth or writing, advocates or teaches the duty, necessity or propriety of crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends, or prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political ends should be brought about by crime, sabotage, violence or other unlawful methods of terrorism * * * is guilty of a felony." Chapter 215, p. 311, Laws 1917.

1. Defendants contend that the statute is so uncertain and indefinite that it is in violation of the provision of our Constitution that, in any criminal prosecution, the accused shall be entitled to know the nature and cause of the accusation against him. Const. Minn. art. 1, § 6. This statute was before the court in State v. Moilen, 140 Minn. 112, 167 N. W. 345, 1 A.L.R. 331. Its constitutionality was there sustained

as against attack made on other grounds. We think it must also be sustained as against the contentions of the defendants. It forbids any one to teach the duty, necessity or propriety of crime, sabotage and other unlawful methods of terrorism as a means of accomplishing industrial or political ends. These words need no further definition. The language used seems to us to fairly and plainly define the crime which the statute creates.

2. The contention is made that the indictment is not sufficient. The indictment charged that the defendants wrongfully, wilfully, feloniously and unlawfully published and circulated an article which is set out at length in the indictment. The substance of the article is: The workers have nothing in common with the capitalist class, but they must fight always and by all means for the overthrow of the capitalist class; the rebellious movements among the workers in this country do not have a real revolutionary character; the tradesmen who belong to the "fogy conservative trade unions" principally participate in strikes, but they are easily deceived and appeased; their leaders are on friendly terms with the so-called exploiters; the trade unions have hardly a semblance of revolutionary significance, and the strikes declared by them will never produce anything which will better the lot of the workers. Then follows this language:

"The fact is, however, that the organized capitalist class of America will never submit to the mercy of the workers without the bloodiest battle history has ever known. It will never, although it should see the workers rising as a mighty force against it, yield before it has used all its means to overthrow it. It will fight and shall fight to the last drop of blood for its exploitation privileges when it sees the overwhelming rise of the labor movement aiming at its destruction. It need not be expected that the capitalists in America will yield the power to the workers willingly more than they have done in other countries, but the workers must take it themselves and march to victory over the ruins of the capitalistic system. We can be certain of that."

And this: "The American workers must learn the revolutionary A-B-C's, that is to fight always and unceasingly with all possible and impossible means until the capitalist class is overthrown, until it rests

blood-stained at the feet of the labor giant, then only the battle will begin to produce results. Then it need not beg and wait, but can have what it needs."

The indictment alleges that said printed matter "advocated, advised and taught the doctrine that industrial and political ends should be brought about by crime, sabotage, violence and other unlawful methods of terrorism."

Defendants invoke the rule that, where a criminal statute uses generic terms, an indictment in the language of the statute is not sufficient, but it must state the particulars, citing U. S. v. Simmons, 96 U. S. 360, 24 L. ed. 819, and other cases. Giving full force and effect to the rule invoked, we are of the opinion that the indictment sufficiently states the particulars of the crime.

3. Defendants contend that the facts alleged do not state a public offense, or, in other words, that the article as published is not a violation of the statute. With this we cannot agree. The language of the article advocates not only violence but bloodshed as a means of accomplishing industrial ends when it says that capital will never submit without the "bloodiest battle history has ever known" and that the workers must learn to fight always and unceasingly until the capitalist class is overthrown, and "until it rests blood-stained at the feet of the labor giant."

4. Defendant corporation contends that the act of 1917 is not applicable to corporations. With this we do not agree. The statutes of this state expressly provide that, in the construction of penal statutes, the word "person" includes a corporation, save when otherwise plainly declared or clearly apparent from the context. G. S. 1913, § 8467, subdivision 11. This seems decisive of defendant's contention. Further language in subdivision 11 that, whenever the word person is used to designate a party whose property may be the subject of any offense, it also includes the state, is not a limitation as to the meaning of the language which goes before. The latter provision does not, as defendant contends, limit corporate criminal liability to crimes against property.

5. The intent of the teacher or advocate is not an ingredient of the offense and need not be charged or proved. State v. Gilbert, 141 Minn. 263, 169 N. W. 790.

6. The trial court read to the jury the following language of section 8648, G. S. 1913: "Every editor or proprietor of a book, newspaper, or serial, and every manager of a * * * corporation by which any * * * newspaper * * * is issued, is chargeable with the publication of any matter contained in such book, newspaper, or serial," and instructed the jury that, if defendant Kekkonen and Toivonen were such managers or editors as contemplated in the statute, then they were responsible criminally for whatever was published.

The court further charged in substance that this meant that managers or editors "immediately active in the publication of a paper" with "more or less control over what matters shall be included in the newpaper" or "immediately in charge of the getting out of a newspaper and * * * responsible for what it contained, would be criminally liable" and that, if "Kekkonen and Toivonen were such managers or editors, * * * then they are responsible criminally for whatever may have been published in that paper * * * and the mere fact * * * that the article may have been written by some other person * * * and that they did not happen to know about it personally before it was published, would not relieve them from criminal liability * * * if their duties were such as to make them responsible for that paper and its contents under this statute."

It may be doubted whether the statute quoted has application to this case. It was first introduced into the statutes of the state as section 215 of the Penal Code of 1885, and as part of the law of criminal libel. However, we find, in the part of the statute quoted, taken in connection with the explanation of the court, nothing materially different from the generally accepted rule of common law. See State v. Mason, 26 Ore. 273, 38 Pac. 130, 26 L.R.A. 779, 46 Am. St. 629; Commonwealth v. Morgan, 107 Mass. 199; People v. Fuller, 238 Ill. 116, 135, 87 N. E. 336; Newell, Slander & Libel, § 483. In fact the charge of the court, taken as a whole, is a substantially correct statement in the abstract of the common law principles applicable to this case.

The managing editor of a newspaper is criminally responsible for an unlawful publication made in the paper, unless the unlawful publication was made under such circumstances as to negative any presump-

tion of privity or connivance or want of ordinary precaution on his part to prevent it. Commonwealth v. Morgan, 107 Mass. 199. In that case it was held not a sufficient defense to show that the editor never saw the article before it was published, was not aware of its publication until the paper was shown him, and that he then made a retraction.

If the rule given by the trial court was right, we do not think it was material error to state that it was a statutory rule instead of a rule of common law.

In the case of Kekkonen, the evidence showed that he was managing editor of the paper. The by-laws of the corporation by which the paper was produced, make it the duty of the managing editor to superintend the make-up of the paper, and he testified that he did as the by-laws directed, though he also said the division of labor was such that he exercised no supervision over the page on which the article in question appeared, and that he did not see it until after it was published. Within the rules above laid down, we think the evidence was sufficient to sustain a finding that Kekkonen was, as managing editor, responsible criminally for the publication of this article.

7. As to Toivonen, the case is quite different. He was business manager. He had no editorial duties. His work, in general, was to purchase supplies, attend to the financial business of the corporation, and in general to take charge of the office. He arranged for the printing of the paper. The circulation and mailing of the paper was under his charge, and was in fact done through the Duluth News Tribune Company, which company printed the paper and delivered it to the Post Office for mailing. In other words. defendant Toivonen had no part in editing or producing the paper. He only circulated and distributed it.

In our opinion Toivonen was not a manager of the corporation within the meaning of section 8648. Neither was he at common law liable for the insertion of matter in the paper, for over such matter he had no control. And the terms of the statute of 1917 make the act of circulation and distribution a crime only where the person charged "knowingly circulates" or "distributes," that is, where such person circulates or distributes the paper knowing its contents. There is no evidence

that Toivonen had any knowledge of the contents of this paper, and his duties did not require him to have such knowledge. The evidence was insufficient to sustain a verdict of guilty against him.

The order appealed from is reversed as to the defendant Toivonen and as to the defendants Workers' Socialist Publishing Company and Kekkonen it is affirmed.

DIBELL, J.

I concur in the result reached as to Toivonen and dissent from the result reached as to the others.

C. S. DEAVER v. JOHN STREET AND MELISSA R. REYNOLDS. JOHN STREET, RESPONDENT.[1]

December 2, 1921.

No. 22,448.

Adverse claims — lien for taxes not warranted by findings of fact.

Findings of fact that plaintiff is the owner of certain lands, and that the defendant, who in his answer claimed title, paid taxes thereon, do not justify a conclusion of law that the defendant has a lien upon the property for the taxes paid.

Action in the district court for Pine county to determine adverse claims to unoccupied land. The case was tried before Tifft, J., who made findings and ordered judgment as set out in the second paragraph of the opinion. From that portion of the judgment decreeing a lien in favor of defendant John Street for taxes and interest, plaintiff appealed. Reversed.

P. W. Guilford, for appellant.

C. P. Carpenter, for respondent.

[1]Reported in 185 N. W. 495.

DIBELL, J.

This is an action to determine adverse claims to land. There was judgment adjudging plaintiff the owner of the land and subjecting it to a lien for taxes paid by the defendant Street. The plaintiff appeals from so much of the judgment as adjudges the land subject to a lien for taxes.

There is no settled case. The findings of fact are that the plaintiff is the owner in fee and that the defendant has paid taxes in amounts specified. Both parties claimed title. The conclusion of law is that the plaintiff is entitled to judgment that he is the owner in fee, and that defendant Street is entitled to judgment adjudging that he had a lien upon the premises for the taxes found paid. There is no finding of the circumstances under which the taxes were paid. The findings do not justify the conclusion that the defendant is entitled to a lien for taxes. The judgment, so far as it adjudges a lien for taxes, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

ANTON WINDELIN AND J. E. LUNDRIGAN, RESPONDENTS v. WILLIAM KIRCHHOF AND OTHERS. WILLIAM KIRCHHOF, APPELLANT.[1]

December 2, 1921.

No. 22,473.

Judgment of dismissal not subject to collateral attack, when.

1. A judgment, though in the form of a dismissal of the action, if based upon findings of fact disposing of the issues presented by the pleadings on the merits, is res judicata and not subject to collateral attack in subsequent litigation between the parties or their privies involving the same questions.

No error.

2. The record presents no error.

[1]Reported in 185 N. W. 386.

Action in the municipal court of the village of Cass Lake in forcible entry and detainer. Defendant answered, alleging ownership and possession of the property in dispute, and moved the judge of the municipal court to certify the case to the district court. The motion was denied and judgment for restitution of the property ordered. From that order, defendant appealed to the district court for Cass county where the appeal was heard by Stanton, J., who made findings and ordered judgment in favor of plaintiffs. From the judgment entered pursuant to the order for judgment, William Kirchhof appealed. Affirmed.

P. J. Russell, for appellant.

J. E. Lundrigan, for respondents.

BROWN, C. J.

Proceedings in forcible entry and detainer in which plaintiffs had judgment and defendant Kirchhof appealed.

The facts are not in dispute. Defendant Kirchhof was the former owner of the property in question, consisting of a lot with building thereon situated in the village of Cass Lake, and had actual possession thereof as such owner for many years. The property was levied upon and sold by the sheriff of the county under an execution issued out of the district court upon a judgment therein against him for the sum of $311.16, the sale taking place on March 16, 1918. There was no redemption from the sale, and plaintiffs hold the title thus acquired. A short time after the sale and on March 29, 1918, defendant brought an action in the district court of Cass county, wherein the property is situated, to set aside and discharge from the record the execution and sale proceedings on various grounds not here necessary to state. Issue was joined therein, and in due course of procedure the cause was tried and resulted in judgment affirming plaintiffs' title to the property. No further proceedings were subsequently had in that action, and the judgment rendered therein on November 26, 1919, became final and beyond attack after the expiration of the time to appeal, which expired on May 26, 1920. Thereafter this proceeding was commenced to gain possession of the property. The sole defense interposed by defendant was a repetition of the

matters and things alleged and set forth in the action brought by him to set the sale proceedings aside, which action was determined adversely to him as just stated. He offered to prove those facts on the trial of this proceeding, but the evidence was excluded on the ground that the former judgment was res judicata thereof.

The only assignment of error requiring mention challenges the ruling of the trial court in holding the prior judgment res judicata. The order striking out parts of defendant's answer alleging the invalidity of the execution and proceedings thereunder, and the ruling rejecting evidence tendered in support thereof, are each necessarily embraced in the final ruling of res judicata, and require no further comment.

On the facts presented, as here outlined, the ruling of the learned trial court was correct. That the former judgment is a bar to further litigation of issues there determined is settled law in this state and elsewhere. 2 Dunnell, Minn. Dig. § 5163, and citations. While this judgment was in the form of a dismissal of the action, it was rendered pursuant to an order of the court and upon findings of fact negativing all claims made by defendant on their merits. It was therefore a final adjudication of the issues presented in this action. Boom v. St. Paul F. & Mnfg. Co. 33 Minn. 253, 22 N. W. 538; Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344, 1 Am. St. 624.

This disposes of the case, and all points requiring mention. The record presents no error and the judgment appealed from is therefore affirmed.

MARTIN O. DURDAHL v. TOSTEN TOSTENSON AND OTHERS.

SAME v. JOHN G. JOHNSON AND ANOTHER.[1]

December 2, 1921.

No. 22,521.

Contract of sale — parol evidence of consideration for modification admissible.

1. Where a contract for the sale of real estate has been modified by

[1]Reported in 185 N. W. 494.

parol and has been performed as so modified, it is no longer within the statute of frauds, and the consideration for performing it as modified, received by one party from the other, may be shown by parol.

Decision sustained by evidence.

2. The finding that plaintiff is the owner of the land and that defendants have no interest therein is sustained by the evidence.

Actions in the district court for Goodhue county, one action to have a notice of lis pendens canceled of record as a cloud upon the title of certain land and the other to quiet title. The cases were consolidated and tried before Johnson, J., who made findings and ordered judgment in favor of plaintiff. From an order denying their motion for amended findings and conclusions or for a new trial, defendants appealed. Affirmed.

Arthur E. Arntson and *Ofstedahl & Rockne,* for appellants.

Mohn & Mohn and *F. M. Wilson,* for respondent.

TAYLOR, C.

In April, 1906, defendant John G. Johnson, as party of the first part, entered into a contract with his uncle, Ole T. Nystuen, as party of the second part, by which he sold and agreed to convey to Nystuen, by warranty deed, a designated parcel of land containing 10 acres, and by which Nystuen agreed to pay therefor the sum of $500—$100 at the making of the contract and $400 in April, 1907—and further agreed not to sell the land "without first giving the party of the first part an option thereon at the price named therein, and an additional charge for the actual cost of buildings placed thereon by party of the second part."

Nystuen took possession of the land, erected a dwelling house, barn and other buildings thereon, and paid the purhase price of $500. In 1911 a controversy arose between them concerning their respective rights under the contract, Nystuen insisting that he was entitled to a deed, and Johnson insisting that he was not to give a deed, but was merely to return the $500 paid by Nystuen and pay the actual cost of the improvements made by Nystuen, whenever the latter wished to surrender the land and terminate the arrangement. Johnson claimed that the $500

was not received as the purchase price of the land, but that he was merely to have the use of that sum as compensation for the use of the land while the land was occupied by Nystuen, and that the contract as written did not correctly set forth the contract actually made. They finally reached an agreement by which Nystuen paid him an additional $150, and he executed to Nystuen a warranty deed for the land, which deed bears date May 4, 1911.

In 1919 Nystuen sold and conveyed the land to plaintiff and removed to the state of Iowa. Thereafter Johnson attempted to bring an action against Nystuen to enforce the rights which he claimed under the original contract, and filed a notice of lis pendens against the land. Thereafter plaintiff brought an action against Johnson and his wife to cancel the notice of lis pendens as a cloud on his title, and later brought another action to quiet title. These two actions were consolidated and tried together. The court made findings to the effect that Nystuen became owner in fee of the land under the deed excuted by Johnson; that plaintiff is the owner of the land under his deed from Nystuen, and that defendants have no right, title or interest therein. Defendants appeal from an order refusing to amend the findings or grant a new trial.

The gist of the present controversy is whether Johnson still has the right to repurchase the land under the provision of the original contract quoted above. The court found in effect that, in settlement of the dispute over the respective rights of the parties under the original contract, the defendants relinquished all rights thereunder and conveyed the land to Nystuen in fee, free from all claims on their part, in consideration of the additional sum of $150 paid by Nystuen. The evidence to sustain such finding is ample.

Defendants invoke the well-established rule that, by virtue of the statute of frauds, a contract for the sale of real estate can be modified or changed only by an agreement in writing, and insist that parol evidence was inadmissible to show that they had agreed to relinquish their rights under the original contract in consideration of the additional payment. This would be true, if the modified contract had remained executory. But the parties to a contract, void under the statute of

frauds, may perform it if they choose, and, if they see fit to carry it out, it becomes an executed contract, to which the statute of frauds has no application, and the consideration for performing it, received by one from the other, may be shown by parol. Blake v. J. Neils Lumber Co. 111 Minn. 513, 127 N. W. 450; McKinley v. Macbeth, 113 Minn. 148, 129 N. W. 216, 389; Kruse v. Tripp, 129 Minn. 252, 152 N. W. 538; Kent v. Costin, 130 Minn. 450, 153 N. W. 874; Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570.

Here the subsequent oral agreement, made for the purpose of settling the dispute between them, was fully performed by both parties. Nystuen made the additional payment and defendants conveyed the land by an absolute deed. Nothing remained to be done by either party, and the contract as modified by the oral agreement was no longer executory but fully executed. The settlement remained unquestioned for eight years.

Defendants argue that the original contract required them to execute a deed, and that the deed which they executed should be deemed to have been executed for the purpose of complying with this requirement and with the intention of continuing the option in force. In answer to this contention, it is sufficient to say that defendants did not, in fact, execute the deed in performance of the original contract, but in performance of the modified contract which, although unenforceable while it remained executory, became unassailable as soon as it was fully executed. As the conclusion reached on this question is decisive of the case, the consideration of other questions is unnecessary.

Order affirmed.

ANNA SMITH v. JOHN SALEM.[1]

December 2, 1921.

No. 22,557.

Assault and battery — verdict supported by evidence.

1. The evidence sustains a finding that the defendant assaulted and beat the plaintiff.

[1]Reported in 185 N. W. 394.

Damages not excessive.

2. The damages awarded are not excessive.

Action in the district court for Hennepin county to recover $5,000 for assault and battery. The case was tried before Hale, J., and a jury which returned a verdict of $1,000 in favor of plaintiff. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Louis L. Swarthe, for appellant.

J. J. Truax, for respondent.

DIBELL, J.

Action for assault and battery. There was a verdict for the plaintiff. The defendant appeals from the order denying his motion for a new trial.

1. In March, 1920, the defendant was a manufacturer of aprons in a small way in Minneapolis. The plaintiff had worked for him irregularly. She came to his store for her pay. She claimed that she had worked 10 hours for which there was $2.50 due, and he claimed that he only owed her $2.25. He claimed that she was "knocking" his business, and seemed to see some connection between his duty to pay and her attitude towards his business. He went out and telephoned the police. The plaintiff claims that before he went for the police he hit her and locked her in the room. This he denies. The plaintiff and the defendant were the only ones present. The defendant was not removing the plaintiff from his store, because she was a trespasser, using such force as was necessary. He either assaulted and beat her, or he did not. The jury chose to accept the testimony of the plaintiff and it sustains a verdict.

2. It is claimed that the damages are excessive. The verdict was for $1,000. The plaintiff's physical injuries were such that the jury could find damage in some substantial amount. In addition there was the attendant humiliation and disgrace, and these are items of actual damages. The jury could find that the act of the defendant was malicious and wanton. There could be an award of punitive damages. The damages cannot be held excessive.

The defendant claims error in singling out the testimony of certain witnesses of the plaintiff and accentuating its importance. We do not sustain this claim and see nothing in it calling for discussion. The trial was conducted with entire fairness.

Order affirmed.

J. A. NELSON AND W. F. NELSON, CO-PARTNERS AS NELSON REAL ESTATE AGENCY v. DARIUS GYTRI.[1]

December 2, 1921.

No. 22,569.

Trover and conversion — delivery to elevator — evidence insufficient.

The parties owned as tenants in common a quantity of oats in a granary on the farm of plaintiffs; there had been no separation of the shares of each from the common mass; defendant hauled some thereof to an elevator and deposited them in their joint names, and a storage receipt was issued accordingly; defendant intended to deliver to plaintiffs the whole or such portion thereof as might be found their due upon a settlement of a claim he held against them; plaintiffs demanded the particular oats as their property and defendant refused delivery until his claim was settled. It is *held*, that there was no conversion of the oats by defendant; plaintiffs had no special right to the particular oats, their right thereto being the same as when the oats were in the granary on the farm, namely, owners in common with defendant.

Action in the district court for Clay county to recover $265 for conversion of certain oats. Plaintiffs' demurrer to the second and third paragraphs of the answer on the ground that the same did not state facts sufficient to constitute a defense, was sustained and leave given to defendant to amend his answer. The case was tried before Nye, J., who when plaintiffs rested granted defendant's motion to dismiss the action on the ground that plaintiffs had failed to make out a case of conversion. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

[1]Reported in 185 N. W. 1169.

Hammett & Morton, for appellants.
James A. Garrity, for respondent.

BROWN, C. J.

Action to recover the value of certain oats alleged to have been wrongfully converted by defendant. It was dismissed at the conclusion of the trial for the failure of the evidence to make out a case, and plaintiffs appealed from an order denying a new trial.

The facts are not in material dispute. It appears that defendant cropped a tract of land owned by plaintiffs, and raised and threshed about 1,800 bushels of oats; these were to be divided equally between the parties, in accordance with sample weights taken of some of the oats at the threshing machine. The oats, as they came from the threshing machine, were all deposited in a granary in one bin, and without attempt to separate the portion belonging to each party. Defendant agreed to deliver the portion belonging to plaintiffs to an elevator, in performance of which he so delivered 667 bushels, leaving, as plaintiffs claim, some 238 bushels yet to be delivered. The precise quantity so remaining due to plaintiffs was a matter in some dispute on the evidence, defendant insisting that the quantity was uncertain and had not been determined by weight. Thereafter defendant took a load of 238 bushels to the elevator and there deposited them in the joint names of plaintiffs and defendant, intending to deliver the quantity due plaintiffs when settlement was had of some twine account defendant claimed to hold against plaintiffs. The elevator storage receipt was issued in the names of both parties. Plaintiffs then demanded the oats so delivered in storage, and defendant refused to surrender the same until his claim was settled.

The ownership of plaintiffs to one-half the oats raised on the farm is not in dispute, but their claim of a conversion of the particular oats so in the elevator in the joint names of the parties, is founded on the demand and refusal just mentioned. If there was a conversion of the oats, it arises from the refusal of defendant to comply with that demand.

The trial court held that the evidence failed to show a conversion and directed a verdict for defendant.

The oats having been placed in the farm granary in a common mass, the parties were owners as tenants in common. No particular part thereof belonged to either party; each owned an undivided interest in the whole. Plaintiffs therefore were not the sole owners of the 238 bushels hauled out by defendant to be delivered to them, or such portion thereof as it should be found they were entitled to upon the adjustment of defendant's claim, and no conversion can be predicated upon his unconditional refusal to deliver them. The oats in the elevator in the joint names of both parties were precisely in the same situation as to ownership as when in the granary on the farm. They were not separated by defendant and set apart unconditionally to plaintiffs, and the parties remained owners thereof as tenants in common. Clearly there was no conversion of the particular oats. Person v. Wilson, 25 Minn. 189. The case would be different perhaps had the oats been separated from the common mass as plaintiffs' remaining share of the whole, or if plaintiffs had made a general demand for their share of the whole and had not singled out and made claim of exclusive ownership to the particular portion in the elevator. Person v. Wilson, supra.

The amended answer put in issue plaintiffs' claim of title, and an admission found in the original can be of no avail at this time. The amended answer is to be construed as the only answer in the case. Hanscom v. Herrick, 21 Minn. 9. The case of Nash v. Brewster, 39 Minn. 530, 41 N. W. 105, 2 L.R.A. 409, is not in point. In that case there was ultimately a separation and delivery to the purchaser of the specified quantity of grain which had been sold from a common mass, but not separated at the time of sale. A fact not here appearing.

Order affirmed.

DIBELL, J. (dissenting).

I dissent:

There were 1,863 bushels of oats threshed. The plaintiffs were to have one-half, or 931½ bushels, elevator weights, delivered at Averill. The

defendant delivered 667 bushels. At the request of the plaintiffs that he complete delivery, he hauled the 238 bushels of which conversion is claimed. The defendant was not hauling his share. He was keeping it for feed, and at one time had in mind buying the plaintiffs' share. After delivery to the elevator he wrote the attorney of the plaintiffs that, as soon as certain bills which he claimed against them were paid, he would turn over the oats in the elevator. In his answer, before it was amended at the opening of the trial by striking out the admission, he admitted the plaintiffs' allegations of ownership of 238 bushels, and claimed that there was something coming to him for twine, etc. A jury could find that the oats were delivered as the property of the plaintiffs. There was evidence of conversion for the jury, and I dissent.

ELIZABETH PETE v. JACOB LAMPI, THE AETNA CASUALTY & SURETY COMPANY AND SOUTHERN SURETY COMPANY.[1]

December 9, 1921.

Nos. 22,400, 22,403, 22,410.

Death caused by illegal sale of intoxicating liquor.

1. Action to recover for the loss to plaintiff in her means of support caused by intoxicating liquor illegally sold to her deceased husband by defendant Lampi. The evidence sustains the finding that Lampi had sold intoxicating liquor to him in violation of law, and that his death resulted from acute alcoholism.

Opinion of medical expert.

2. Where the testimony of a medical expert, taken by deposition, disclosed that his opinion as to the cause of death was based in part on facts ascertained from third parties out of court, but such facts have been established at the trial by other evidence before the deposition was read, his opinion was properly received in evidence.

Inaccurate hypothetical question — refusal to strike question and answer.

3. Where an expert gives his opinion in answer to a hypothetical

[1]Reported in 185 N. W. 653.

question which contained minor inaccuracies, but his subsequent testimony showed that such inaccuracies had no part in the formation of his opinion, the court properly refused to strike the question and answer.

Authenticated copy of death record.

4. The claim that the copy of the record of death is not authenticated by the proper officer, is not borne out by the record as it is certified by the state registrar.

Bank book admissible in evidence.

5. The bank book of the deceased was properly received in evidence as having some bearing on his financial condition.

New trial — inclusion of damages for period before death.

6. The evidence will not warrant a finding that plaintiff sustained a loss in her means of support prior to the death of her husband, and, for the error in permitting the jury to award damages for a period of some two and one-half years prior to that date, there must be a new trial.

Recovery against surety for illegal sales.

7. If it be shown that illegal sales to the deceased, made during the period covered by a surety bond, substantially contributed to cause the ailment which produced death, a recovery may be had against the surety.

Charge erroneous.

8. It was error to instruct that the certificate of death was conclusive proof of the facts therein stated, unless rebutted by competent evidence.

Action in the district court for St. Louis county against Jacob Lampi and the sureties on his bond to recover $75,000 for the death of plaintiff's husband. The case was tried before Fesler, J., who when plaintiff rested denied defendants' separate motions for dismissal of the action and at the close of the testimony denied their separate motions for directed verdicts, and a jury which returned a verdict in favor of plaintiff and against defendant Lampi for $9,746; against Southern Surety Company for $2,500 and against defendant Aetna Casualty & Surety Company for $2,000. From orders denying their separate motions for judgment notwithstanding the verdicts or for new trial, defendants took separate appeals. Orders denying motions for judgment notwithstanding verdict affirmed; orders denying motions for new trial reversed.

Victor H. Gran, John J. Fee, George H. Spear and *Russell P. Fischer,* for appellants.

John Jenswold and *John D. Jenswold,* for respondent.

TAYLOR, C.

The defendant Lampi kept a saloon in the city of Ely in St. Louis county for many years. The defendant Southern Surety Company was the surety on his bond in the sum of $2,000 for a period of one year beginning June 5, 1915, and was also the surety on his bond in the same sum for a further period of one year beginning June 5, 1916. The defendant Aetna Casualty & Surety Company was the surety on his bond in the same sum for a period of one year beginning June 5, 1917. The three bonds, each for the period of one year, covered the three years between June 5, 1915, and June 5, 1918. The plaintiff was the wife of Herman Pete who died December 29, 1917. In September, 1919, plaintiff brought this action, under section 3200 of the General Statutes of 1913, against Lampi and his bondsmen, alleging that Lampi had illegally sold intoxicating liquor to her husband during the period covered by these bonds, in consequence of which he died on December 29, 1917, from acute alcoholism, and that she had been injured in her means of support by the intoxication caused by the liquor so illegally sold. The trial resulted in a verdict against Lampi in the sum of $9,746; against the Southern Surety Company in the sum of $2,500; and against the Aetna Casualty & Surety Company in the sum of $2,000. Each of the defendants made a motion for judgment notwithstanding the verdict or for a new trial, and appealed from the order denying the motion.

Herman Pete had been a hard periodic drinker for many years. In 1914 he went to the hospital for inebriates at Wilmar and thereafter refrained from drinking for some months. He then began drinking again, and as time passed his "sprees" became more frequent and more protracted. On the afternoon of his death, he sat in an arm chair in Lampi's saloon for a long time in a drunken sleep or stupor. Late in the afternoon he fell from the chair to the floor, was moved into a small

adjoining room and was subsequently found to be dead. The deputy coroner, Dr. Ayres, was called. He took charge of the body and on the following day caused an autopsy to be made.

Dr. Ayres was not present at the trial, but his deposition, previously taken, was read to the jury and is the only expert testimony in the case. The doctor testified that the autopsy disclosed nothing abnormal in any of the vital organs of the deceased, and nothing from which the cause of death could be determined. In answer to a hypothetical question requiring him to assume facts, some of which in minor particulars were not quite in accord with the facts proven at the trial, he stated that in his judgment the deceased died from acute alcoholism. On cross-examination he stated that his opinion, that death was caused by acute alcoholism, was not based on anything disclosed by the autopsy, but on the fact that the deceased had been a heavy habitual drinker for many years and had indulged in excessive and protracted drinking on the day of his death, and on the further fact that he was unable to find any other reasonable explanation of the cause of death. It further appeared from the cross-examination that the doctor had known Mr. Pete for some 20 years and had personal knowledge of his drinking habits, but had no personal knowledge of what happened on the day that he died, and that the doctor's information concerning what happened on this day was obtained from others in the examination which he made as coroner. On the redirect examination the doctor testified, in part, as follows:

"Q. And your examination of the body in the saloon and the autopsy were made for the purpose of ascribing a cause to his death? A. Yes sir. Q. And, as I understand you, basing your opinion upon the results of these two, and your personal knowledge of his drinking habits, and the assumption that he had been drinking considerable on the day of death, you reached a conclusion as to this? A. Yes sir. Q. And that was? A. Death was due to acute alcoholism."

Defendants earnestly contend that both the hypothetical question and the doctor's opinion as to the cause of death should have been excluded. They insist that his opinion was based on hearsay information obtained from unknown third parties outside of court, and was inadmissible for

that reason under the rule stated and applied in Miller v. St. Paul City Ry. Co. 62 Minn. 216, 64 N. W. 554; Webb v. Minneapolis St. Ry. Co. 107 Minn. 282, 119 N. W. 955; and Thompson v. Bankers M. C. Ins. Co. 128 Minn. 474, 151 N. W. 180, Ann. Cas. 1916A, 277. As said in these cases:

"Medical expert cannot be allowed to give his opinion on information which he has obtained out of court from third parties other than the patient."

But the doctor's testimony shows that the facts on which he based his opinion were all within his personal knowledge, except the fact that Herman Pete had indulged in excessive and protracted drinking on the day of his death. This fact had been established by other evidence before the deposition was read, and we think the ruling admitting his opinion in evidence was correct within the principle applied in Thompson v. Banker's M. C. Ins. Co. supra. The doctor's subsequent testimony shows that the inaccurate statements in the hypothetical question had no part in the formation of his opinion, and hence could not have been prejudicial to the defendants. See Donnelly v. St. Paul City Ry. Co. 70 Minn. 278, 73 N. W. 157; Moehlenbrock v. Parke, Davis & Co. 141 Minn. 154, 169 N. W. 541.

Defendant's contention that the copy of the record of death, received in evidence, was not certified to by an officer authorized to make such certificates, is not borne out by the record, for the document shows that the certificate was made by the state registrar. Furthermore the original record was made by Dr. Ayres in his capacity as deputy coroner, and all the matters stated therein were fully covered by the testimony of the doctor in his deposition.

Defendants complain because the court admitted in evidence the bank book of Mr. Pete covering the period from February, 1914, to the time of his death. The evidence shows that he was engaged in logging and that the principal part of his business consisted in furnishing timber to the mines. There was some evidence, although not very definite, as to the extent and profits of his operations. The bank book showed that he made deposits and drew checks against them, and that at all times

during this period, except once, in 1916, when his account seems to have been overdrawn, he had money in the bank subject to check. We fail to see wherein this fact was prejudicial to defendants. The book was properly received as having some bearing on his financial condition.

It is contended that plaintiff failed to prove any unlawful sales of liquor, and the Southern Surety Company insists that, even if unlawful sales were made, none were shown within the period covered by the bonds executed by that company.

It is true that the evidence as to specific sales of liquor to Herman Pete is very meagre. But the evidence shows that he was an habitual drunkard; that Lampi's saloon was the place to which he nearly always resorted when drinking; that he had been taken out of this saloon drunk innumerable times; and that these occurrences extended over the entire time here in question, although his "sprees" were more frequent during the latter part of the time. It also appears that the saloonkeepers of the city had been forbidden to sell liquor to him, but the time or times when these notices were given was left uncertain. One of the conditions in each of the bonds was that no sale of intoxicating liquor should be made to "any intemperate person or habitual drunkard." We think the evidence fully warranted the jury in finding that Lampi had violated this condition of the bonds.

The action is based on the claim that plaintiff had been injured in her means of support by the unlawful sale of intoxicating liquor to her husband. Defendants contend that there is no evidence that plaintiff sustained any loss in her means of support prior to the date of her husband's death, and that the court erred in refusing to give an instruction to that effect requested by them, and in giving instructions to the contrary requested by plaintiff. This raises the principal question in the case.

The court instructed the jury to the effect that if Lampi, by illegal sales of liquor to Herman Pete, injured plaintiff in her means of support, he would be liable to her for the loss sustained; that the Southern Surety Company would be liable to her for that part of the loss which they traced to the period covered by the two bonds given by that com-

pany, and that the Aetna Casualty and Surety Company would be liable for that part of the loss which they traced to the period covered by the bond given by the Aetna Company. The following instruction requested by plaintiff was given:

"If you find from the evidence that during the period from June 5, 1915, to June 5, 1916, the defendant Lampi did, by illegally selling intoxicating liquor to Herman Pete, cause the intoxication of the said Pete, and that by reason thereof, the plaintiff was injured in her means of support, or that said intoxication, if any, contributed to cause the death of the said Pete, or both, then you will find a verdict in favor of plaintiff and against the defendant Southern Surety Company for such amount of damages as plaintiff may be entitled to by reason thereof."

Similar instructions, requested by plaintiff, were also given in respect to the periods covered by the other two bonds. The court gave the jury two forms of verdict, one for the plaintiff and one for the defendants. The form for the plaintiff contained a blank space in which to insert the amount awarded against defendant Lampi, a second blank space in which to insert the amount awarded against defendant Southern Surety Company, and a third blank space in which to insert the amount awarded against defendant Aetna Casualty & Surety Company. The court instructed the jury that, if they found a verdict for plaintiff, they should first determine the total amount of damages she had sustained and insert that as the amount against Lampi; that they should then determine the amount of damages she had sustained during the period from June, 1915, to June, 1917, and insert that as the amount against the Southern Surety Company, and should then determine the amount of damages due to illegal sales made after June 4, 1917, and insert that as the amount against the Aetna Company. The jury seem to have been in doubt as to whether they could award, against a surety, any damages except those sustained during the period covered by its bond, and returned into court and requested further instructions. They were informed in substance that, if, by reason of illegal sales made during the period covered by a bond, plaintiff had been injured in her means of support after the period covered by the bond had expired, that was a

proper element for them to take into consideration in fixing the damages.

In her testimony, plaintiff, herself, negatived all suggestions that the support furnished her in her husband's lifetime had been lessened in any manner by reason of his drinking. Asked whether Herman ever gave her any money to spend for her own purposes, she answered: "Yes, I always had money if I wanted to have it." Asked what she did when Herman stopped giving her money, she answered: "He didn't stop giving me money." Asked whether she had as many and as good clothes and as much food and of the same kinds after Herman went to the asylum at Wilmar as before, she answered: "Yes." She also answered that the supplies furnished were about the same throughout her entire married life. Asked whether the fact that Herman began to drink heavily made any difference, she answered: "He didn't drink all the time." Asked whether, when he did drink, it made any difference, she answered: "It didn't make any difference, save that life seemed to be much sadder. He took good care of his home."

An attempt was made to show the profits which Herman Pete had made in his business but without much success. He seems to have kept no formal books of account. Such accounts as were kept were kept by his son, Jacob, but Jacob was unable to give any definite information concerning the profits. There is no evidence and no claim that they were any less in the period immediately preceding Mr. Pete's death than in prior years. In fact testimony given on plaintiff's behalf and subsequently stricken out would indicate that his business had been considerably more profitable during this period than previously.

As the financial ability of her husband to support her does not appear to have become impaired in his lifetime, and as the supplies, in money and necessaries, actually furnished her do not appear to have been curtailed in any way on account of his drinking, we feel constrained to hold that the evidence will not justify a finding that plaintiff had suffered any pecuniary loss prior to her husband's death. Her pecuniary loss resulted from the fact that his death took from her thereafter the support which she had previously enjoyed. For this loss she is entitled to recover, but, under the instructions given them, the jury may have

included in their verdict a substantial sum as damages sustained in her husband's lifetime. We have no means of knowing what part of the verdict was for damages in his lifetime, or what part was for damages resulting from his death. For this reason there must be a new trial.

The Southern Surety Company insists that it is entitled to judgment notwithstanding the verdict, for the reason that no loss was sustained during the period covered by its bonds. If it be shown that illegal sales of intoxicating liquor to Herman Pete, made during this period, contributed in a substantial degree to produce the ailment which caused his death, a recovery may be had against this company, and, as a sufficient showing may be made on another trial, we think the application for judgment should not be granted.

While the instruction, requested by plaintiff and given by the court, to the effect that in the absence of competent rebutting evidence the certificate of death was conclusive proof of the facts stated herein, was erroneous, this error is not likely to occur at another trial and requires no further discussion.

Defendants insist that the verdict is excessive, but, as there must be a new trial, it is not necessary to consider this claim.

The several orders denying the motion for judgment notwithstanding the verdict are affirmed; the several orders denying the motions for a new trial are reversed and a new trial is granted.

STATE v. FRANK BRODT.[1]

December 9, 1921.

No. 22,405.

Trial — judge's question to jurors not improper.

1. There was no impropriety in an inquiry made by the trial judge and addressed to the jurors during an intermission in the trial to ascertain their preference as to the time when the case should be submitted to them. As a rule only private communications between the judge and

[1]Reported in 185 N. W. 645.

jury, which are had after the case has been submitted, are *held* to be improper.

Trial — reference by judge to expense for jurors' fees.

2. Defendant cannot complain because, in granting his request for an adjournment before the usual hour, the trial judge referred to the expense the county was incurring for jurors' fees.

Defendant's letter admissible to show guilty knowledge.

3. Defendant's letter to one of the men who had sold stolen automobile tires to him, saying he would take all the tires he could bring, was properly received in evidence as tending to show guilty knowledge when he purchased the tires described in the indictment.

Defendant's assertion admissible in evidence.

4. A statement by defendant, after his arrest, with reference to the number of tires he had purchased and the price paid was properly received in evidence.

Letter admissible because of cross-examination of writer.

5. By cross-examining the witness for the state, about a statement purporting to appear in a letter concerning the defendant which the witness had written, the entire letter became admissible to show that the alleged statement had not been made.

Defendant was indicted by the grand jury of Dakota county charged with the crime of buying and receiving stolen property, tried in the district court for that county before Converse, J., and a jury, and found guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Affirmed.

William J. Quinn, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham,* Assistant Attorney General, and *Alfred E. Rietz,* County Attorney, for respondent.

LEES, C.

Defendant was convicted of the crime of buying and receiving stolen property, and appealed from an order denying a new trial. He does not question the sufficiency of the evidence to sustain the verdict of the jury.

1. After the evidence was all in, the court ordered an afternoon recess. During the recess the trial judge entered the jury room where

some of the jurors were, and asked the other jurors who were in the corridor of the court house to come in. When all the jurors were present he asked them whether they preferred to have the case submitted to them that evening or the next morning. They replied that they preferred to have it go over until morning. When the trial was resumed the court announced that, as a result of a conference with the jury, an adjournment would be taken until the following morning. This incident is the basis of defendant's first complaint. He contends that a trial judge cannot have any communication with the jury, except in open court in the presence of the parties or their attorneys, citing Hoberg v. State, 3 Minn. 181 (262), to support the contention. In that case the trial judge visited the jurors after they had retired to consider their verdict, and had communication with them apart from and without the consent of the defendant or his counsel. Obviously the situation presented was entirely different from that which arose here. Crabtree v. Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694, and Read v. City of Cambridge, 124 Mass. 567, 26 Am. Rep. 690, are also cited. Each case dealt with private communications between the trial judge and the jury, after the case had been submitted to the jury. Such communications are generally condemned. Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; Havenor v. State, 125 Wis. 444, 104 N. W. 116, 4 Ann. Cas. 1052; Dodge v. United States, 258 Fed. 300, 169 C.C.A. 316, 7 A.L.R. 1510; 16 C. J. p. 1090. Here the communication was immediately brought to the attention of the parties, had nothing to do with the issue on trial, took place before the case had been submitted to the jury, and by no stretch of the imagination can prejudice to the defendant be imputed to the incident. See State v. Bragdon, 136 Minn. 348, 162 N. W. 465; State v. Kruse, 137 Minn. 468, 163 N. W. 125.

2. When the state rested, defendant's counsel asked for an adjournment in order to prepare certain motions and submit authorities. The court granted the request reluctantly, saying that counsel should be ready to go on with the trial of their cases, that the county was at an expense of $150 a day for jurors and that there were other cases to try. These remarks are complained of, but we are wholly at a loss to

discover the slightest impropriety in them or to see how defendant could have been prejudiced by them.

3. The stolen property consisted of automobile tires which Joseph Wasser and Thomas Mullaney had sold to defendant. They had pleaded guilty to a charge of having stolen the tires. Over defendant's objection, a letter he had written to Mullaney was received in evidence. It was written after he had purchased the tires. It read in part as follows:

"Bring all the tires you can. Will take them. I am working on the merchandise and will let you know later about that, but I want the other stuff right away. Wire me if you will come so I won't be off hunting."

Mullaney was not a dealer in tires. His last occupation, so far as the record shows, was working in a pool-room. He lived at Hastings and defendant at South St. Paul. Defendant knew him. His request for more tires was competent evidence, for it tended to show defendant's guilty knowledge in connection with the purchase from Wasser and Mullaney of the tires they had stolen.

4. Defendant testified in his own behalf that he bought five tires from Wasser and Mullaney for $195. They testified they sold him nine tires for $195. In rebuttal the state called the justice of the peace, by whom defendant was committed for trial, and, over objection, he testified that when defendant was brought before him he said he bought five tires from Wasser and Mullaney for $75. This bore on the question of defendant's good faith in making the purchase. If he bought nine instead of five tires of the kind described in the testimony, the jury might properly infer that the price paid was so small that he must have known the tires were stolen.

5. Wasser testified that, after the defendant bought the tires, he sold one of them back to him to use on a Dodge car he was driving. Some time after he bought this tire, Wasser was arrested and confined in the county jail at Duluth. While there he wrote a letter to his brother at Hastings. In cross-examining him, defendant's counsel inquired about statements he had made in the course of an interview with him. He was asked whether he wrote to anyone about the tire in question, and he answered that he had written to his brother. Asked whether he had

the letter with him, he said he had, and at counsel's request handed it to him. He was asked when he wrote the letter saying he wanted to "get" defendant; also whether he still wanted to "get" him; also whether he had not written the letter because he wanted to "get" defendant. On his redirect examination he identified the letter and it was offered in evidence. Defendant objected on several grounds, one that counsel had not gone into its contents. The court ruled that by the cross-examination a portion of the alleged contents of the letter had been brought out and that the whole of it ought to be placed before the jury, and it was received and read to the jury.

In this letter Wasser wrote that he had bought a tire from defendant; that when he bought it defendant told him it was one of the tires he and Mullaney had sold him; that defendant had the serial number on the tire destroyed and the word "second" burned over it so as to protect himself if Engel should see the tire on the Wasser car; that he wished he had never seen defendant, for, if he had not, he would not be in trouble. The letter ended with a request that the tire be taken off the car as defendant would remember it as it would be good evidence against the writer. Engel, referred to in the letter, was proprietor of a garage at Hastings and the tires had been stolen from him. The tire referred to in the letter was brought into court and received in evidence. It appeared that the word "second" had been burned in on the side. Wasser testified that this was done in South St. Paul at defendant's direction when he bought the tire from him.

The admission of the letter presents the only doubtful question in the case. Defendant's counsel sought to bring out by cross-examination of Wasser that he was filled with hatred of defendant and was anxious to "get" him or have him convicted. The cross-examination would naturally lead the jury to infer that there were expressions in the letter indicating such a desire. Such was not the fact. Of course the letter was not admissible as independent evidence of defendant's guilt, but, under the circumstances, we think it was admissible to clear up the jury's possible misapprehension of the facts. When the significance of a former statement of a witness has been distorted by a fragmentary or inaccurate repetition of it, the entire conversation or writing may be

received to explain its true significance. 2 Wigmore, Ev. § 1045; Lombard v. Chaplin, 98 Me. 309, 56 Atl. 903; Wilkerson v. Eilers, 114 Mo. 245, 21 S. W. 514.

We are satisfied that defendant had a fair trial and that his conviction should be sustained. The order denying a new trial is, therefore, affirmed.

FRED J. KITOWSKI v. THOMPSON YARDS, INC.[1]

December 9, 1921.

No. 22,441.

Sale — breach of warranty of quality — complaint construed.

1. In an action for damages for the alleged breach of a warranty of the quality of certain building material sold by defendant to plaintiff, the complaint is *held* to state facts showing an implied warranty of quality as created by the Uniform Sales Act, chapter 465, Laws 1917.

Implied warranty not affected by express warranty, when.

2. An express warranty in such case, not inconsistent with that implied, does not affect or destroy the latter.

Verdict sustained by evidence.

3. The evidence sustains the verdict finding the alleged warranty and breach thereof, and the damages awarded are within the limits of compensation for the loss suffered.

No error.

4. The record presents no reversible error.

Action in the district court for Stearns county to recover $4,291.60 for breach of warranty in a sale of cement. The history of the case is given at the beginning of the opinion. The case was tried before Roeser, J., who at the close of the testimony denied defendant's motion that plaintiff be required to elect as to whether he relied on an implied warranty or an express warranty, and defendant's motion for a directed verdict for $603.84, and a jury which returned a verdict for $2,621.

[1]Reported in 185 N. W. 504.

From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

V. C. Sherman, E. Fitchette, and *O'Malley & O'Malley,* for appellant.

Henry H. Sullivan, for respondent.

BROWN, C. J.

In the purchase of material for the construction of a large factory building on his premises plaintiff applied to defendant for a supply of the necessary quantity of cement for use in the walls and floor of the structure. Negotiations resulted in the purchase from defendant of the required quantity, and it was subsequently delivered upon the premises of plaintiff and used for the purposes stated. After the construction had come well under way, the main floor and parts of the walls were found weak, defective and inadequate by reason of the fact, as claimed by plaintiff, that the cement used therein, and so supplied by defendant, was of a poor and inferior quality and wholly unfit for the particular purpose, and had to be torn down and rebuilt at a considerable cost and expense. By reason of this, plaintiff claims to have suffered damage in the sum of $4,000, and he brought this action to recover the same. The basis of the action, as stated in the complaint, is that defendant represented and warranted the cement as good in quality and fit and suitable for the use intended, upon which plaintiff relied in making the purchase. Defendant interposed by answer, in addition to a denial of the alleged warranty, a counterclaim for the value of the cement and for the foreclosure of a mechanic's lien therefor which had been filed against the property.

At the close of the trial defendant moved the court for a directed verdict for the amount of its asserted lien, which was denied. Thereupon all the issues were submitted to the jury with the result that plaintiff had a verdict for $2,621. Defendant appealed from an order denying its alternative motion for judgment or a new trial.

The assignments of error, challenging the rulings of the court in the admission and exclusion of evidence and in the instructions and refusals

to instruct the jury, are reduced and resolved by counsel for defendant to three distinct principal contentions, namely: (1) That the complaint fails to allege and the evidence fails to show a warranty of quality of the cement, either express or implied; (2) if such warranty be held properly alleged and sufficiently proven, that the evidence wholly fails to show a breach thereof; and (3) that the damages awarded by the jury are excessive.

1. The complaint alleged that, at the time plaintiff purchased the cement, he informed defendant of the purpose for which it was intended, and that with that knowledge defendant warranted it as fit and suitable therefor. It appears from the evidence, in harmony with those allegations, that plaintiff informed defendant that the cement was intended for use in the construction of a concrete factory building, and also made the inquiry whether the cement was good, and defendant replied that it was. Plaintiff relied upon that assurance. We think and so hold that the warranty relied on was sufficiently alleged and that the evidence sustains the allegations. It is not important on the facts here disclosed whether it be called an express or implied warranty, for on the allegations of the complaint as well as on the evidence the warranty shown is just what our Uniform Sales Act (chapter 465, p. 767, Laws 1917), declares an implied warranty. And, even though the complaint be construed as alleging an express warranty, there is nothing therein inconsistent with that which the sales act implies, and that so implied is not thereby destroyed or rendered without force or effect. The general rule that an express warranty excludes one by implication therefore has no application. Chapter 465, p. 772, Laws 1917, subd. 6, § 15.

2. The question whether there was a breach of the warranty, that is, whether the cement was of a good quality and fit for the intended purpose, or whether the result of its use and the weak and defective floor and walls made therefrom followed from an improper mixture of the cement with the right proportion of sand, was, though the question is not entirely free from doubt, a fair question for the jury. It was answered in plaintiff's favor, which the trial court has approved, and there the matter must rest, for our examination of the evidence will not justify the conclusion that the verdict is manifestly unsupported.

3. The damages claimed by plaintiff consisted in various items of cost and expense incurred in the removal of the main floor of the building and parts of the walls, and reconstructing the same with new material, all made necessary by the poor quality of the cement furnished by defendant, together with the rental value of the factory during the period the completion thereof was thus delayed. There was no allegation of general damages. That the items are recoverable is clear. Each represented an actual loss flowing naturally and proximately from the use of the defective cement, and necessarily within the contemplation of the parties. Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422, 50 L.R.A.(N.S.) 753. The amount thereof constitutes the compensation the law intends to award in such cases. 1 Dunnell, Minn. Dig. § 2561; Carli v. Seymour, Sabin & Co. 26 Minn. 276, 3 N. W. 348; City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368; Hydraulic-Press Brick Co. v. Haynes Bread Co. 128 Minn. 401, 151 N. W. 140. The rule applies to the loss of the use of the building during the delay caused by the inferior cement. 8 R. C. L. 490. The complaint is sufficient as against an objection first made on the trial, and there was no error in admitting the evidence showing the damage. The damages, though itemized separately, are general in character, and not special because so specially pointed out.

The case of Liljengren F. & L. Co. v. Mead, 42 Minn. 420, 44 N. W. 306, cited by defendant is not in point. That action involved a breach of contract to deliver window-sash and frames for use in the construction of a building, and defendant's answer to an action to recover the purchase price thereof, alleging damage occasioned by the delay of plaintiff in the delivery of the material as required by the contract, was held defective in not alleging that like sash and frames could not have been procured elsewhere and the delay thus avoided; the damage there claimed was the loss of the use of the building. The rule does not apply to the case at bar, for here the cause of the delay was not discovered until the cement had been used, and the poor quality thereof was not known for some time thereafter.

It is finally urged that deduction in plaintiff's recovery should have been made by the jury to the extent of the value of the cement of good

quality which went into the portions of the building not rebuilt or removed as defective. The court instructed the jury to make such deduction; defendant contends that none was made, therefore, that a new trial should be granted for that reason. In this we do not concur. This feature of the case did not receive much attention at the trial, the main effort of defendant being directed to other issues. We have considered the record with some care and find therein very little upon which the jury could base a definite finding of the amount or value of the cement remaining in the building after the removal of the floor and defective walls. Plaintiff claimed only specific items of damage; defendant interposed in its answer the value of the material as a counterclaim. Plaintiff by direct evidence established his loss and damage, and the burden was upon defendant to make good its claim. As we read the evidence, the allowance of any amount in deduction of plaintiff's established loss would rest almost wholly in speculation and conjecture. In that situation there is no error for which a new trial should be had.

This covers the case and all that need be said in disposing of the appeal. The complaint states a cause of action, the evidence supports the verdict and the record presents no reversible error. The court did not err in overruling the objection to evidence of the payment of $97.50 on the purchase price of the cement. The payment was admitted by the answer of defendant. It was proper evidence at the stage of the case when objected to, and was not again, so far as we discover from the record, referred to on the trial. If counsel were of opinion that the amount thereof should be deducted from plaintiff's recovery, request to that effect should have been made at the time of the charge to the jury; the attention of the court should have then been called to the matter. That was not done.

Order affirmed.

JOHN NOLAN v. LISTON Q. GREELEY,[1]

December 9, 1921.

No. 22,449.

Vendor and purchaser — statutory notice to terminate contract — injunction.

The proceeding for a cancelation of a land contract under G. S. 1913, § 8081, by serving, upon default, a notice of termination, is in the nature of a statutory strict foreclosure. The proceeding is in pais. If there is no default, it is without effect. The time for removing the default commences running when the notice is served. After the service of the notice the vendee cannot have a temporary injunction vacating the service or suspending the effect of the notice, and restraining the proceeding, under the facts stated in the opinion, upon the ground that he is not in default.

Action in the district court for St. Louis county to restrain defendant from proceeding with the cancelation of a certain contract. From an order, Magney, J., granting a restraining order except the part which read: "But it is hereby provided and understood that the defendant Greeley may accept payments under said contract for any month subsequent to the months in issue without thereby waiving any other right now had in this action," defendant Greeley appealed. Reversed.

D. J. Erickson and *H. J. Grannis,* for appellant.

G. A. E. Finlayson, for respondent.

DIBELL, J.

The defendant appeals from an order granting a temporary injunction.

The plaintiff Nolan was the vendee in a contract for the purchase of a tract of land in Duluth and the defendant Greeley was the vendor. The purchase price was payable in monthly instalments. The contract

[1]Reported in 185 N. W. 647.

had the usual provisions for cancelation and forfeiture in case of default.

Nolan paid the amounts due to the Western Development Company, his agent, for the seven months from October, 1920, to April, 1921. The company claims it paid these amounts to Greeley by applying them on a note which he was owing to the company under such circumstances as to constitute payment. Therefore the plaintiff claims there was no default and no right in the defendant to cancel the contract. This is the issue.

On April 19, 1921, Greeley gave plaintiff notice of cancelation in accordance with G. S. 1913, § 8081, which provides that, if defaults are not removed within 30 days after notice served, the contract shall terminate. A few days later the plaintiff brought an action for an injunction, and on May 3 an order was made granting a temporary injunction. The injunction granted this relief:

"It is ordered, that upon the filing hereof with the clerk of this court and a bond in the penal sum of $250.00, with sureties approved by the court, that an injunction forthwith issue, granting unto plaintiff the following relief until the further order of the court, to-wit:

"1. The service of said notice of cancelation of said contract, be and the same is hereby in all things vacated and set aside.

"2. That the defendant, Greeley, is hereby restrained from foreclosing and canceling said land contract and all proceedings in the matter of said cancelation are hereby stayed.

"3. That said Register of Deeds is hereby restrained from receiving, filing or recording said notice, any proof of service thereof and affidavit of default of plaintiff in compliance therewith or any other paper relating to such attempted cancelation.

"But it is hereby provided and understood that the defendant, Greeley, may accept payments under said contract for any month subsequent to the months in issue without thereby waiving any other right now had in this action."

Under the contract Nolan was the equitable owner and Greeley held the legal title as security for the unpaid payments. Their relation was

in the nature of that of mortgagor and mortgagee. The statutory proceeding for the cancelation of a land contract is in the nature of a statutory strict foreclosure. The proceeding is in pais. When there is a default and the notice is properly served and the 30 days have elapsed, the default not having been removed, the contract is terminated. The effect of serving the notice is in a way like the effect of the sale on foreclosure by advertisement. The period of 30 days commences to run when the notice is given. If the payments were made, as claimed here, and consequently there was no default, the giving of the notice accomplished nothing. It was no more effective than the foreclosure by advertisement of a paid mortgage, which, in the absence of an estoppel, gives nothing upon which to rest a claim of title.

The present action is a proper enough one in which to determine whether payment was made, and, by consequence, whether Greeley got anything through his cancelation proceeding. It may go to trial for that purpose, but we see in this case no equitable ground upon which to rest an injunction assuming to vacate the service of the notice or to suspend its operation. If an action had been brought before the service of notice, an injunction, on a sufficient showing, might be granted, staying a cancelation. Freeman v. Fehr, 132 Minn. 384, 157 N. W. 587. And so a sale on foreclosure by advertisement may be restrained when there is no default or there is an excessive claim of the amount due. O'Brien v. Oswald, 45 Minn. 59, 47 N. W. 316; Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787, 35 L.R.A.(N.S.) 909, Ann. Cas. 1912C, 568; G. S. 1913, § 7890. Here the giving of the notice was a fact accomplished, and from then on the statute was in operation shortening from day to day the time in which to remove the defaults.

The plaintiff claims a defense to the cancelation. Whether he has one is for trial in the pending action. He has chosen to make the issue in an action against his vendor. It is suggested, though the question is not for decision here, that the issue might have been made, without imperiling the plaintiff's title through an adverse decision on the issue of payment, by paying under protest and suing to recover as an involuntary payment. Bennett v. Healey, 6 Minn. 158 (240); McMurtrie

v. Keenan, 109 Mass. 185; Klein v. Bayer, 81 Mich. 233, 45 N. W. 991; Vereycken v. Vanden Brooks, 102 Mich. 119, 60 N. W. 687; First Nat. Bank v. Sargeant, 65 Neb. 594, 91 N. W. 595, 59 L.R.A. 296.

The plaintiff does not need an injunction to protect him against a sale by the defendant or a recording of papers. A lis pendens will protect him against subsequent purchasers.

Order reversed.

JACOB BRUTSCHER v. OSCAR P. JACOBSON.[1]

December 9, 1921.

No. 22,450.

Negligence — contributory negligence.

1. The evidence is such as to sustain a finding that both parties to a collision of vehicles were negligent and that plaintiff cannot recover.

New trial not warranted.

2. There was no showing of misconduct on the part of defendant or of newly discovered evidence sufficient to warrant a new trial.

Charge to jury.

3. There was no error in the charge of the court to the jury.

Action in the district court for Morrison county to recover $505 for injuries to plaintiff's horse, buggy and person received in a collision with defendant's automobile. The answer interposed a counterclaim of $100 for damages to defendant's automobile. The case was tried before Parsons, J., and a jury which returned a verdict for defendant. Plaintiff's motion for a new trial was denied. From the judgment entered pursuant to the verdict, plaintiff appealed. Affirmed.

D. M. Cameron, for appellant.

N. N. Bergheim, for respondent.

[1]Reported in 185 N. W. 934.

HALLAM, J.

1. On an evening in March plaintiff was driving his horse and buggy north on a country road. Defendant was driving his auto south. They collided. The graded road was good and was 36 feet wide. Defendant's headlights were lighted. Plaintiff saw the lights when the auto was far enough away for him to turn out. He thought they must be far away and kept the center of the road until the auto was almost upon him. Defendant was also in the center of the road. As to what happened as they met the evidence is in conflict. Plaintiff says he turned off to the right and as he turned he was struck. Defendant, in his answer, alleged that plaintiff kept the middle of the road. In his testimony he said plaintiff was in the center of the road, if anything, crowding him on the left hand side, and when he saw plaintiff there was not time to turn out. He also testified that, as the parties collided, both swung to the east. At another place in his testimony he says plaintiff swung to his left. At another place he spoke of plaintiff turning to his right. The jury might have found that it made little difference which way plaintiff turned, for the evidence on the part of defendant is such that the jury might well find that a collision was then inevitable, whichever way the parties turned.

It is difficult to escape the conclusion that defendant was negligent. We think, however, that the evidence sustains a finding that plaintiff also was negligent in keeping the center of the road, until too late to avoid an accident, and on that theory the verdict may be sustained.

2. After the trial plaintiff moved for a new trial on the ground among others of newly discovered evidence. Defendant thereupon submitted an affidavit, in which he said that plaintiff kept the middle of the road. Plaintiff contends that this statement was inconsistent with his testimony and constituted both misconduct on his part and newly discovered evidence and warranted a new trial. As above noted, this statement is the same as the allegation in the answer and it is not so out of harmony with defendant's somewhat confused testimony as to furnish any ground for a new trial.

3. Plaintiff assigns as error the giving of certain instructions to the jury. Several paragraphs of the charge are embraced in one assignment

of error. We do not deem it necessary to reproduce in this opinion the somewhat lengthy paragraphs to which exception is taken. We have examined them with care and are of the opinion that there was no error.

Judgment affirmed.

MINNIE DAVIDSON, AS MOTHER AND NATURAL GUARDIAN OF ERNEST DAVIDSON, AN INFANT v. OTTER TAIL POWER COMPANY.[1]

December 9, 1921.

No. 22,469.

Question of negligence of the parties for the jury.

The plaintiff's minor son was injured by coming into contact with an electric wire of the defendant. Whether the defendant was negligent, and whether the boy was negligent, were questions for the jury, and it was error to direct a verdict for the defendant.

Action in the district court for Otter Tail county to recover $30,000 for injuries to plaintiff's minor son. The case was tried before Parsons, J., who at the close of the testimony granted defendant's motion for a directed verdict. From an order denying her motion for a new trial, Minnie Davidson appealed. Reversed.

C. E. Warner, for appellant.

N. F. Field, for respondent.

DIBELL, J.

This is an action by the plaintiff, the mother of Ernest Davidson, a boy ten years and three months old at the time of his injury, to recover in his behalf damages which he sustained by coming into contact with a live electric wire of the defendant. The court directed a verdict

[1]Reported in 185 N. W. 644.

for the defendant. The plaintiff appeals from the order denying her motion for a new trial.

The defendant, an electric power company, had a dam and switch house and other buildings, and owned a tract of land, 5½ miles southwest of Fergus Falls at a point called the Dayton Hollow Dam. About 200 feet southeast of the switch house it had a duplex house for the use of the two men in charge of the plant, each of whom had charge of a shift of 12 hours. One of these men was the husband, now deceased, of the plaintiff, and the father of Ernest, and he lived with his wife and a large family of children in the house mentioned.

In the early part of 1914 the company was adding a second story to its switch house. In the second story the lightning arresters were to be placed. At the time they were outside the switch house resting on wooden blocks and were inclosed by a wooden shack. These lightning arresters, as they appeared from the outside and so far as they need be described, consisted of three tubular tanks about 18 inches to 2 feet in diameter and 6 feet high, bushed at the top. They were about 2 feet apart and were parallel with the south side of the switch house. At the top they were connected with electric wires running from the first story of the switch house. The wires carried a voltage of 38,000 or 40,000, and when they entered the tanks were about 7½ feet from the ground. The tanks were not in themselves dangerous.

In the course of the construction of the second story, the company built an outside stairway attached to the south side of the switch house. At its top it connected with a platform from which there was an entrance through a doorway into the second story. The foot of the stairway was about 16 inches from the nearest part of the wooden shack inclosing the lightning arresters and was 3 to 3½ feet high. The tank nearest the stairway was something like 18 inches inside the shack. As the stairway ascended it passed easterly and away from the electric wires. There was a railing on the outside, and at the lower end wooden slats were nailed across to keep persons from going to the second story. There is a dispute as to whether the railing and the slats were in place at the time Ernest was injured, which was in the early part of July,

1914. The plaintiff claims that they were not; the defendant claims that they were. The presence of the railing, with slats across the top of the lower end, seems as favorable to a right of recovery as its absence.

It is uncertain just how Ernest was injured. The trial was conducted upon the theory that his hand came in contact with a live wire. The evidence is that a space within 2 feet of wires so heavily charged is a danger zone. Not much attention is given to this fact. The danger of a "brush" shock, such as was involved in Hoppe v. City of Winona, 113 Minn. 252, 129 N. W. 577, is not developed. It is certain that Ernest was playing about the stairway. He was found at the foot where he had fallen. There is a claim that he was on the fourth or fifth step, that there was no railing, and that he slipped or fell, and in trying to save himself caught the wire. This seems improbable; it is perhaps impossible. It is quite as likely that he was playing on the slats at the lower end of the stairway, or on the railing, and slipped and was about to fall, and caught the wire, or in some way came in contact with it. In any event he was severely burned by electricity.

The wires carried a deadly current. We have had occasion to comment upon the amount of watchfulness and diligence necessary to constitute the ordinary care which negatives negligence where such an agency is used. Drimel v. Union Power Co. 139 Minn. 122, 165 N. W. 1058; Hoppe v. City of Winona, 113 Minn. 252, 129 N. W. 577, 33 L.R.A.(N.S.) 449, Ann. Cas. 1912A, 247; Musolf v. Duluth Edison Elec. Co. 108 Minn. 369, 122 N. W. 499, 24 L.R.A.(N.S.) 451; Gilbert v. Duluth Gen. Elec. Co. 93 Minn. 99, 100 N. W. 653, 106 Am. St. 430. We have had occasion to comment upon the care exacted of those using a dangerous agency, such as dynamite, when children are about. Mattson v. Minnesota R. Co. 95 Minn. 477, 104 N. W. 443, 70 L.R.A. 503, 111 Am. St. 483, 5 Ann. Cas. 338; Vills v. City of Cloquet, 119 Minn. 277, 138 N. W. 33; Eckart v. Kiel, 123 Minn. 114, 143 N. W. 122; Erickson v. W. J. Gleason & Co. 145 Minn. 64, 176 N. W. 199. Always the duty of exercising care commensurate with the dangers to be apprehended from so perilous an agency as electricity is recognized in the cases. Daltry v. Media Co. 208 Pa. 403, 57 Atl. 833;

Meyer v. Menominee, 151 Wis. 279, 138 N. W. 1008; Hayes v. Power Co. 95 S. C. 230, 78 S. E. 956; Consolidated Co. v. Healy, 65 Kan. 798, 70 Pac. 884; Caruso v. Troy Gas Co. 153 App. Div. 431, 138 N. Y. Supp. 279; Wittleder v. Citizens Co. 50 App. Div. 478; Connell v. Keokuk Electric Ry. & P. Co. 131 Iowa, 622, 109 N. W. 177; Nelson v. Branford Co. 75 Conn. 548, 54 Atl. 303; Benton v. North Carolina P. S. Corp. 165 N. C. 354, 81 S. E. 448. And in these cases, as in others, the duty of exercising commensurate care, when children are about, is emphasized.

The application of the general rule is often difficult. It is so here. Ernest was at home. No fence separated the house and the plant. Davidson had a large family of children and the defendant knew it. The children, the jury could find, played about the plant much as they chose. They were forbidden entrance to the switch house. There is evidence that they played about the stairway. If the defendant permitted Ernest to play about the stairway, or where he might be hurt by the wires, or knew or should have known that he was doing so, and the jury could find such to be the fact, it was its duty to exercise ordinary care, which means watchfulness and diligence commensurate with the danger arising from the presence of the live wires. That the wires could have been guarded without appreciable expense and without interference with their operation seems conceded. The boarding of the inclosing shack did not extend above, or much above, the tanks at the point next to the end of the stairway. Ernest, if playing on the railing, or on the slats crossing at the lower end of the stairway, would come dangerously close to the wires. He would be in danger. The boarding could have been extended upward, and danger from the wires obviated.

We are of the opinion that the questions of the defendant's negligence and the boy's contributory negligence upon the facts recited, were for the jury.

We have given the facts as accurately as is possible, appreciating, of course, that they should be taken favorably to the plaintiff on this motion. We have read the original settled case, where question and answer appear, to get a better view than the printed narrative record

gives. The evidence as to distances is not always certain. The defendant's witnesses do not at all times quite agree. More than 6 years have elapsed since the accident. Ernest was then only a little over 10, and his brother, the only other person present, was 2 years younger, and other children of the family, who testified at the trial, were youthful. Naturally enough they may have impressions from talks since rather than an actual recollection of what occurred then.

Order reversed.

HENRY TIMM v. GEORGE B. AITON.[1]

December 9, 1921.

No. 22,510.

Variance — when disregarded.

1. A variance between the allegations of a pleading and the evidence tendered on the trial in support thereof, unless substantially material and of a nature to mislead the adverse party, should be disregarded, or an amendment permitted or ordered by the court to cure the defect.

Variance not misleading.

2. The variance shown in this case *held* not substantial or misleading.

Promise to pay debt of another not within statute of frauds.

3. A promise to pay the debt of another, for the payment of which the promisee is secondarily liable, on the agreement of the promisee to repay the amount, all in parol, is an original undertaking and not within the statute of frauds.

Action in the district court for Itasca county to recover $1,200 for money had and received. The case was tried before Stanton, J., who at the close of the testimony granted defendant's motion to dismiss the action on the grounds that the facts stated in the complaint were not sufficient to constitute a cause of action; that there was a material variance between the allegations of the complaint and the evidence, and

[1]Reported in 185 N. W. 510.

that there was no consideration at all for any promises on the part of defendant. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

Charles W. Scrutchin, for appellant.

Willard A. Rossman, for respondent.

BROWN, C. J.

It appears from the pleadings and evidence in this case that one Somers on February 17, 1915, made and delivered to the Mercantile State Bank of Minneapolis his certain promissory note for the sum of $1,000, payable 90 days from date with interest. The note was indorsed by defendant in this action. It was subsequently transferred to the Security State Bank of Grand Rapids, of which the indorser, defendant herein, was the president and managing officer. It was not paid and was overdue and an asset in defendant's bank. Plaintiff had been a partner of Somers, the maker of the note, in the real estate business, and defendant requested him to take it up, saying that the bank examiner would object to the bank carrying the overdue paper, at the same time agreeing that, if plaintiff would pay the note, he, defendant, would repay the amount as soon as he could. On the strength of this promise of repayment, plaintiff paid the note to defendant's bank and it was delivered to him. Defendant has at all times refused to repay the money, and this action was brought to recover the same. The action was dismissed at the trial for the failure of plaintiff to make out a case, and on the further ground that there was a material variance between the allegations and proof. Plaintiff appealed from an order denying a new trial.

We are of opinion that the learned trial court erred in dismissing the action. The evidence unexplained or uncontradicted, the substance of which is stated above, made a prima facie case for recovery against defendant. The transaction was in substance a loan of the money to defendant, under his promise to repay the same. That there was a consideration for the promise cannot well be doubted. Defendant was liable on the note as an indorser; by the payment he was released from

that liability; therein is a sufficient consideration, in addition to the $1,000 parted with by plaintiff. Van Cappellan v. Chicago, St. P. M. & O. Ry. Co. 126 Minn. 251, 148 N. W. 104. The transaction therefore does not come within the statute of frauds.

The point that there was a material variance between the allegations of the complaint and the evidence tendered by plaintiff, is technically correct. The complaint proceeds on the theory of money had and received, when the cause of action in reality is one for money loaned. But defendant was not misled. His counsel seems to have been fully aware of the real transaction as shown by his cross-examination of plaintiff while on the stand as a witness. The rule of variance between allegations and proof is that, unless substantially material and of a nature to mislead the adverse party, the court rather than order a dismissal will direct or permit an amendment of the pleading, or disregard the matter entirely. 2 Dunnell, Minn. Dig. § 7672; Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472; Adams v. Castle, 64 Minn. 505, 67 N. W. 637. The rule is otherwise where the variance is substantial and misleading. But this point, as suggested by counsel on the argument, was not the ground for the order dismissing the action; the theory that the statute of frauds applied to the case seems to have been the real basis of the dismissal.

Order reversed.

FLOUR CITY FUEL & TRANSFER COMPANY v. MARGARET A. YOUNG.[1]

December 9, 1921.

No. 22,533.

Right to trial by jury.

1. In an action for merchandise sold, both the plaintiff and the defendant have a constitutional right to a trial by jury.

[1]Reported in 185 N. W. 934.

Constitution — right to trial by jury — Conciliation Court Act valid.

2. In the conciliation court of Minneapolis there is no trial by jury. There is a right of removal in the losing party to the municipal court where a trial by jury is given. The giving of a trial by jury in the municipal court upon removal, with no jury trial in the conciliation court, satisfies the constitutional guaranty of a jury trial, and the act establishing the conciliation court is not unconstitutional because it does not give a jury trial in the conciliation court in the first instance.

Same — requirement of bond to pay judgment invalid.

3. The requirement of the statute that the losing party in the conciliation court, where the controversy is heard informally and determined summarily, must, as a condition to removal and a jury trial in municipal court, execute a bond to pay the judgment rendered in the conciliation court and such judgment as may be rendered in the municipal court, unreasonably burdens the right to a jury trial and is unconstitutional.

Remainder of act valid.

4. The unconstitutional exaction of a bond is not so connected with the subject of the statute nor so essential an element of it that the act is unconstitutional as a whole. The provision for a bond is nugatory and will be disregarded, and there is left a workable statute.

Same — requirement of jury fee valid.

5. The provision that the removing party pay $5 as a condition to removal, this being the jury fee and fees of the clerk in the municipal court, does not unduly burden the right to trial by jury, and is constitutional.

Upon the relation of Margaret A. Young the supreme court granted its writ of certiorari directed to the conciliation court of Minneapolis, and to plaintiff, to review the judgment of that court, Salmon, J., in plaintiff's favor. Writ quashed.

Margaret A. Young, pro se.

Ralph S. Parker and *M. U. S. Kjorlaug,* for respondent.

DIBELL, J.

Certiorari to the conciliation court of Minneapolis, on the relation of the defendant, to review a judgment in favor of the plaintiff for $40.85. The plaintiff is a dealer in coal and the defendant the owner

of a flat building. The plaintiff's claim was for coal delivered to the defendant at her flat building. The defendant demanded a trial by jury. It was refused.

If the defendant was entitled, under the Constitution, to a jury trial in the conciliation court, there is error in the judgment. If she was entitled to a jury trial under the Constitution, and the act gives her a jury trial upon the removal of the action to the municipal court, and a jury trial there is sufficient to satisfy the constitutional guaranty, there is no error in the judgment, for she did not avail herself of the right of removal, but, if the right of removal and trial by jury in the municipal court is so hedged about with restrictions or so burdened with conditions that it is not a jury trial, such as the Constitution guarantees, the act is unconstitutional and the judgment is wrong, unless such restrictions and conditions are of such character that they may be disregarded and the imposition of them treated as nugatory and there be left a working statute.

A determination of the questions involved requires a brief consideration of the right to jury trial and the nature of the conciliation court and the procedure therein.

1. The Constitution provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy," etc. Const. art. 1, § 4. The right of jury trial is a right of jury trial as it existed in the territory at the time of the adoption of the Constitution. Hawley v. Wallace, 137 Minn. 183, 163 N. W. 127, and cases cited; 2 Dunnell, Minn. Dig. § 5227. At that time the statute gave a jury trial, among other cases, "in an action for the recovery of money only." R. S. 1851, c. 71, § 6. The statute has continued. G. S. 1913, § 7792. The plaintiff's action was an ordinary common law action for the recovery of money only, and was a case at law within the Constitution. State v. Minnesota T. M. Co. 40 Minn. 213, 41 N. W. 1020, 3 L.R.A. 510. Each party was entitled to a trial by jury.

2. The conciliation court was established by Laws 1917, p. 377, c. 263, entitled "an act to provide for an additional judge of the munici-

pal court for the city of Minneapolis, Hennepin county, and providing for such judge to act as a court of conciliation and small debtors court."

The court is a branch of the municipal court. It has conciliation jurisdiction to the extent of the jurisdiction of the municipal court. As a court of conciliation it exercises its friendly offices when invoked in bringing the parties to an agreement. If it succeeds a proper judgment is entered. If conciliation fails a dismissal follows, unless the amount involved does not exceed $50, in which event the court proceeds as a small debtors court, informally hears the parties, and summarily enters judgment. The ordinary rules of procedure are put aside. Substantive law is not disregarded. It is not intended to give one party something or to deprive the other party of anything, still, the proceeding is summary, and the usual safeguards attendant upon the investigation of an issue of fact are purposely omitted in the interest of a speedy determination. It is intended that a substantially right result will be reached. At all events it must be speedy.

It is not the theory of the statute that judges or juries are hostile to poor litigants or that they do not treat them justly. Such a notion is at war with the practical experience of those dealing directly with courts and juries. The theory, from a conciliation standpoint, is that many disputes may be amicably settled, if the parties are brought together, face to face, before an unprejudiced and sympathetic judge, who will painstakingly inform them of their rights under the law, suggest what may be done, and tactfully help them to an amicable ending of their controversy. The theory from the standpoint of a small debtors court is that litigation by the common law method over small claims is wasteful, and fails to bring practical justice because of an expense out of proportion to the amounts involved, the time of the parties consumed in the litigation when they should be engaged otherwise, and the attendant delay in reaching a result. The legal profession notes the waste more clearly than laymen. It is recognized that to some extent defendants decline to pay, knowing that the smallness of the claim practically insures against compulsory payment. It is recognized that some persons having small claims submit to a denial of payment, because

they cannot incur the expense and await the termination of the ordinary trial. Under the act the expense is put upon the taxpayers of the city, and the trial is speeded. It is all over in a few days. The effort is to avoid contention and a prolonged controversy, and lawyers are excluded. While it is recognized that litigation without expense may encourage the assertion of doubtful or unfounded claims, or claims that might as well go unasserted, the thought of the statute is that on the whole justice is best subserved by a summary consideration of small controversies without expense to the parties.

This is not the place to discuss the character and history and policy of such courts. We are interested in them here only as they affect the legal questions presented. A study of them is given under the title of Justice and the Poor in Bulletin No. 13, Carnegie Foundation, 41-67. See also Renaud v. State Court M. & A. 124 Mich. 648, 83 N. W. 620, 51 L.R.A. 458, 83 Am. St. 346; 26 Harvard Law Rev. 302, 310; 64 Pa. Law Rev. 357; Bulletin No. 8, Am. Jud. Soc. In an article in 1 Minn. Law Rev. 107, written shortly prior to the passage of the Minneapolis act, and in 2 Minn. Law Rev. 491, written shortly after, William R. Vance, then dean of the University Law School, writes of such courts, their purposes and workings, and gives their historical background, and he mentions the constitutional question which now engages our attention.

The statute does not provide for a jury in the conciliation court. There is no way of getting one. If a party is aggrieved by the judgment rendered by the conciliation judge, and is entitled to a jury trial, he "may have the cause removed to said municipal court for trial by jury." To get this jury trial he must "file with said judge a bond executed by the party demanding the removal, his agent or attorney, to the adverse party in a sum sufficient to secure the amount of such judgment, and costs in such municipal court with sufficient surety to be approved by said conciliation judge, conditioned that the party so removing same shall prosecute said case with effect in said municipal court and abide the order of the court therein and pay any judgment that may be rendered against him therein." He must further file an affidavit of good

faith and must pay the sum of $5 for costs and jury fee in municipal court. The case then goes to the jury calendar of the municipal court and has a speedy hearing.

The constitutional guaranty is satisfied if a party is afforded a jury trial on appeal, though not in the tribunal of primary jurisdiction. Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873; Alford v. State, 170 Ala. 178, 54 South. 213, Ann. Cas. 1912C, 1093; Moundsville v. Fountain, 27 W. Va. 182; Jones v. Robbins, 8 Gray (Mass.) 329; Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186; City of Emporia v. Volmer, 12 Kan. 622; O'Laughlin v. Bird, 128 Mass. 600. This holding was approved in State v. Everett, 14 Minn. 330 (439); a criminal case, where the defendant was entitled to a jury trial under Const. art. 1, § 6.

3. The question whether the exaction of a bond is constitutional is very nearly if not quite determined by our prior decisions. In State v. Everett, 14 Minn. 330 (439) just cited, it was held that the provision for a trial before a jury of 12 on appeal from a justice of the peace, before whom there was a trial with a jury of 6, which was of course not a constitutional jury, did not satisfy the constitutional guaranty, where the defendant, as a condition to the appeal, was required to "enter into a recognizance, with one or more sufficient sureties, conditioned to appear before said court and abide the judgment of the court herein, and in the meantime to keep the peace and be of good behavior." He was not permitted to suffer a commitment; and the holding was that the requirement that he recognize with sureties, to get a trial before a constitutional jury of 12, deprived him of his constitutional right of trial by jury. And we have Weir v. St. Paul S. & T. F. R. Co. 18 Minn. 139 (155). It involved an appeal from the award of commissioners in condemnation. The statute provided for a hearing before a jury on appeal to the district court and required a bond in double the amount of the award conditioned to prosecute the appeal and abide the judgment. Without deciding whether there was a constitutional right of trial by jury on appeal, the court, assuming that there was, said that the section of the statute, requiring a bond, "as it would fetter the right

of trial by jury, must in such cases be treated as nugatory." There are other holdings of like effect.

In Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873, it was held that a party's right to a jury trial under the seventh amendment was not unduly restricted when on an appeal from a justice of the peace, where he did not have a constitutional jury trial, to a court affording him one, he was required to give a bond to pay the judgment of the appellate court. There are similar holdings under the constitutions of the different states and the doctrine is well enough sustained, though the cases are not in harmony. The conflict is not easily if at all reconcilable. We may note, too, that in this state from the beginning the party appealing from a justice of the peace has been required to give security to abide the judgment of the district court. The question is not free of difficulty, but following the lead of our early cases, and having in view the watchful jealousy of the courts of an impairment of the right of a free and inviolate jury trial, we hold that the requirement of the statute that, to get to a jury after summary hearing in the small debtors court, the party removing the action must give bond to pay the judgment in both courts, is unconstitutional.

4. The requirement that a bond be given is not at all the heart of the statute. The legislature might have left it out. It doubtless would have passed the act without the exaction of a bond on removal, if it had understood that such exaction was unconstitutional, just as readily. The provision for a bond is not so connected with the subject matter and the purpose of the statute that the whole statute fails if it is unconstitutional. 2 Dunnell, Minn. Dig. § 8936, and cases cited; Fairley v. City of Duluth, supra, page 374, 185 N. W. 390; Bofferding v. Mengelkoch, 129 Minn. 184, 152 N. W. 135; State v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; State v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527. Using the language of Weir v. St. Paul S. & T. F. R. Co. 18 Minn. 139 (155) cited supra, the provision for a bond will be "treated as nugatory."

5. The portion of the act requiring the party asking a removal to pay $5 as a condition of removal and a jury trial has had consideration. The majority of the court are of the view that it does not impose such a

burden upon the right to a jury trial as to render the requirement of payment by the removing party unconstitutional. From territorial times a jury fee has been exacted, as well as clerk's fee, and that is what is exacted here. In the municipal court the party demanding a jury trial pays a $3 jury fee; if not demanded, a jury is waived. We do not fail to note that in this case the party subjected to the payment is the defendant who is in the court unwillingly. The Chief Justice and the writer are not in accord with this view, but if this provision were held unconstitutional it is not their view that the whole act would fall.

Objection is made to the act because of the severe provisions for costs in the event of a removal to the municipal court and a failure to reduce the recovery. They are not involved here. Objection is made to the provision of the act that there shall be no appeal from the judgment of the municipal court, but that it shall be final. That objection is not here. No one is trying to appeal from the municipal court. We may note, however, that, while the right of appeal is statutory, there may be a constitutional right to a review in the supreme court which survives the failure to provide a statutory appeal and all assertions of finality. County of Brown v. Winona & St. P. Land Co. 38 Minn. 397, 37 N. W. 949.

The result is that the defendant, while entitled to a jury trial, was not entitled to a jury trial in the conciliation court; that a provision sufficient to satisfy the Constitution was made for a trial by jury in the municipal court upon removal there; that the requirement for giving a bond, in order to get to a jury and present her case, is unconstitutional, and is to be disregarded, that its unconstitutionality does not so affect the rest of the act as to make it wholly unconstitutional and that the provision for paying $5 on removal from the conciliation court to the municipal court is not unconstitutional. The defendant is wrong in her insistence upon a constitutional right to a jury trial in the conciliation court. She has not put herself in position for a jury trial in the municipal court. Up to the present time she has no legal grievance. No statutory costs are allowed.

Writ quashed.

AMERICAN BARLEY COMPANY v. W. H. L. McCOURTIE, S. J. BOAL, H. L. CLANCY, F. N. JOHNSON, P. J. CLANCY, AND JOHN M. LYNCH.[1]

December 9, 1921.

No. 22,568.

Corporation — liability of promoters to other stockholders.

Promoters of a contemplated corporation secured contracts whereby all the stockholders of an existing corporation, owning and operating a cereal mill, agreed to exchange the shares of stock owned by them for an equal number of shares of the capital stock in the corporation to be formed. It is *held* that those who so contracted, and to whom, in pursuance of such contracts, shares of capital stock in the new corporation were issued, do not stand in the position of stockholders subsequent to the incorporation, but they had an interest in the corporation promoted from the time the contracts were made, so that the promoters stood to them in a fiduciary capacity and could not secretly and without consideration issue capital stock for their own use.

Action in the district court for Hennepin county to obtain the surrender of capital stock of plaintiff corporation of the par value of $300,000 and to recover $288,300. From an order, Molyneaux, J., sustaining defendant McCourtie's demurrer to the first cause of action in the second amended complaint, plaintiff appealed. Reversed.

Johnson, Palmer & Watson and *Thompson, Hessian & Fletcher*, for appellant.

M. H. Boutelle, for respondent.

HOLT, J.

A demurrer by defendant McCourtie to plaintiff's first cause of action was sustained, and it appeals.

The substance of the allegations are these: That defendants S. J

[1]Reported in 185 N. W. 506.

Boal and H. L. Clancy were the original promoters of the plaintiff and that McCourtie joined them shortly after its organization, assented to and contrived with them in all they did from the beginning down to the present time; that said three defendants were partners in the entire transaction of the promotion and organization of plaintiff and were in complete control thereof, using the other defendants merely as straw men in carrying out the plans of the said three partner defendants; that McCourtie was not to be a stockholder or officer of plaintiff, but was the general manager; that the three mentioned partner defendants concealed the fraudulent transactions hereinafter mentioned from the remaining stockholders and parties in interest; that about February 1, 1914, the partner defendants conceived the plan of organizing plaintiff, ostensibly for enumerated lawful purposes, particularly the manufacture of barley products, but that the true purpose of the partner defendants was to cheat the real parties in interest and the subsequent stockholders and to enrich themselves; that in May, 1914, plaintiff was organized under the laws of South Dakota with a capital stock of $500,000, which in 1916 was increased to $2,000,000. It is then alleged that, prior to the incorporation of plaintiff, another South Dakota corporation, named F. N. Johnson Barley Flour Company, hereinafter referred to as the flour company, was operating a barley cereal mill at Carver, Minnesota, owning the mill and equipment, and the defendant F. N. Johnson owned the secret formulae under which the cereal was manufactured; that under the scheme defendant partners, on or about February 1, 1914, obtained, for the purpose of purchase by plaintiff, temporary control for a period of three months of the properties and good will of the flour company and of the Johnson formulae; that such control was obtained separately from Johnson under an option agreement to purchase, and the partner defendants agreed to and with the flour company's stockholders that they would pay to each a one-half share of preferred and a one-half share of common stock in plaintiff corporation to be formed for each share held by such stockholder in the flour company; that since said time up to the present the said flour company stockholders have continued to

be parties in interest in plaintiff, but did not discover the fraud of the partner defendants until just before the commencement of this action; that, at the time the partner defendants obtained the control of the property above mentioned, they agreed with defendant Johnson to issue $15,000 of the preferred stock of the plaintiff company to be formed and $35,000 of its common stock for his interest in the property mentioned; that such agreement was separate from the one with the flour company stockholders, and was not with their knowledge or consent; that said formulae were of no value; that thereafter on June 2, 1914, the partner defendant caused $15,000 capital stock of plaintiff to be issued to the stockholders of the flour company, in accordance with the agreement made prior to its organization, and $300,000 to said Johnson; that Johnson was merely to hold said stock for the partner defendants; that said partner defendants were the real owners of the stock so fraudulently obtained without consideration, and have since from time to time required F. N. Johnson to deliver the certificates thereof in blank, which have been by them transferred to innocent parties and the moneys derived from such sales have been appropriated by them so that rescission is now of no avail. There are many reiterations of fraud and other allegations that do not add anything of substance to the cause of action attempted to be stated.

Respondent relies on Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952; Old Dominion Copper Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. ed. 1025; Insurance Press v. Montauk Fire Detecting Wire Co. 103 App. Div. 472, 93 N. Y. Supp. 134; Seymour v. Spring F. C. Assn. 144 N. Y. 333, 39 N. E. 365, 26 L.R.A. 859.

It is, however, to be noted that in all the cases cited by respondent the promoters owned all the property turned over to the corporation and received all the shares issued at the time of the organization. When that was done the stockholders owned property of the same value as formerly, no matter what the face value of the stock was. Those who subsequently became stockholders could not be legally injured, if the property exchanged by the promoters for capital stock issued to them

had been overvalued. But, under the allegations here, the flour company stockholders did not occupy the position of subsequent stockholders to the promoters, including McCourtie. They, as well as Johnson, were interested in plaintiff before its organization. Its organization was brought about through the contracts under which both such stockholders and Johnson were to turn over certain property and receive stock issued. No other capital stock was to be issued, except in the ordinary way by a sale thereof and payment into the treasury of the price. Then it is alleged that $300,000 were issued, ostensibly to Johnson for the secret formulae, but in reality for the benefit of the partner defendants. This was $250,000 more than was agreed should be issued to Johnson for his secret formulae when the flour company stockholders made their agreement. It is not necessary to consider now the allegations that the secret formulae were of no value.

It is plain that such issue of stock to Johnson for the benefit of the partner defendants was without consideration and fraudulent in law, if the allegations are true that it was done without the knowledge of the flour company stockholders who then already had an interest in plaintiff. This unwarranted issue of $250,000 par value of the capital stock above what the bargain was with Johnson, when the agreement with the flour company stockholders was made, necessarily depreciated the value of the stock in plaintiff that they were entitled to receive. The net result is that a profit went to the partner defendants at the expense of the flour company stockholders. We think the observations made in Davis v. Las Ovas Co. 227 U. S. 80, 33 Sup. Ct. 197, 57 L. ed. 426, as to the difference between that case and the one of Old Dominion Copper Co. v. Lewisohn, supra, are somewhat applicable here. It seems to us the partner defendants, as promoters of plaintiff, stood in a fiduciary relation to those who had become interested in its organization under the agreement with the flour company stockholders, so that, when it did take place, they could not cause to be issued stock without consideration and for their own benefit that necessarily depreciated the stock that was to go and did go to the flour company stockholders. The situation of the partner defendants here is somewhat similar to that of the parties in Lyons v. Webster, 197 Ala. 654, 73

South. 337, where they voluntarily surrendered the stock obtained without consideration, but where one of the promoters thereafter attempted to saddle his loss on that score upon one of the others. The court there characterizes the relation of promoters towards those who have contracted to become stockholders in the contemplated corporation as fiduciary, so that no secret profits can be made by them.

We think the demurrer should have been overruled.

Order reversed.

IN THE MATTER OF THE ESTATE OF HAROLD THORSON, DECEASED.[1]

December 9, 1921.

No. 22,571.

Inheritance tax computed on value of property received under compromise.

It is *held*, following the rule stated in State v. Probate Court of Kandiyohi County, 143 Minn. 77, in construing the inheritance tax statute in a case involving a compromise and settlement of rights arising out of a will in contest before the court, that the basis for the computation of the tax is the quantum or value of the property actually received under the compromise and settlement, and not the amount stated in the will and not in fact received.

Upon the relation of the attorney general the supreme court granted its writ of certiorari directed to the probate court for Ramsey county, Bazille, J., to review the action of that court in refusing to determine the inheritance tax upon that portion of decedent's estate received by certain persons under the terms of a compromise agreement. Reversed and remanded.

Clifford L. Hilton, Attorney General, and *Egbert S. Oakley,* Assistant Attorney General, for relator.

Moore, Oppenheimer, Peterson & Dickson, for respondent.

[1]Reported in 185 N. W. 508.

BROWN, C. J.

Harold Thorson, late of Ramsey county, died on February 18, 1920, leaving a last will and testament disposing at his death all and singular his property and effects in the manner and to the legatees and devisees therein named. The total value of all specific legacies amounted to $211,323.25, including a gift of $5,000 to the Norwegian Lutheran Church of America, a religious corporation. The residue of the estate, amounting to something over one million dollars was given to St. Olaf's College, a religious and educational corporation of this state, at Northfield. The will was duly submitted to the probate court of Ramsey county for allowance and probate, and notice of hearing thereon duly given. On the date of such hearing a daughter of testator, and a legatee named in the will, appeared and filed a contest against the allowance of the same, upon the grounds stated in the written objections filed with the court. The contest was never submitted to the court for determination, the parties interested in the estate having effected a settlement of all matters in controversy, thus rendering a decision thereof unnecessary. By the settlement so made, which was formally approved by the probate court and filed therein, the contest was dismissed and withdrawn; the executors named in the will declined to act as such, and all concerned joined in a request for the appointment of P. O. Halland, a disinterested party, to act in that capacity in her place and stead. On the allowance of the will, which followed the settlement, he was duly commissioned executor and thereafter qualified as such. The shares of the children of testator, all named in the will as legatees in different amount, were by the settlement substantially increased over and above the amounts stated in the will, and the residue passing to St. Olaf's College correspondingly diminished. For illustration, Celia L. Thorson, daughter and contestant, received under the will the sum of $10,000; the settlement gives her $100,000; Thor D. Thorson, son and legatee, received by the will $500; the settlement gives him $90,000. The other heirs fare relatively the same. In consideration of the settlement St. Olaf's College covenanted and agreed promptly after the distribution of the estate "pursuant to the will and under authority of the court" to pay over to the heirs of testator the amounts set off to

them by the settlement.

In proceedings initiated by the state for the ascertainment of the inheritance taxes due from the estate or legatees, the probate court held that the basis for the computation thereof was the amount given the different legatees by the will, and not the amount received by each through the settlement. The cause is before this court in review of that conclusion on certiorari sued out by the attorney general on behalf of the state.

While the facts do not bring the case strictly within those appearing in State v. Probate Court of Kandiyohi County, 143 Minn. 77, 172 N. W. 902, known as the McIntyre case, the construction there given the inheritance tax statute applies, and, though perhaps an extension of the rule of that case, we adopt it as the basis for the ascertainment of the tax on facts like these here presented. In that case there was a will contest; the interested parties made an amicable, good-faith settlement and adjustment of their respective claims to the estate, and stipulated for an order by the probate court admitting the will to probate, and for a decree distributing the property of the estate in harmony with the terms of the settlement. The principal legatee by the settlement received less than the will gave her. It was there contended that the settlement should be ignored and the tax laid on the basis of the will as written. The point was not sustained, the court, in construing the statute, holding that the intent of the law was to lay the tax upon the share of the estate actually received by legatees or distributees, and not upon the amount specified in the will. And, since the principal legatee in that case did not receive the quantum of property specified by the will, the tax was levied upon what the settlement, made in good faith and without purpose to evade the tax, gave and set off to her. The only difference between that and the case at bar is that here no stipulation was made for a decree of the court distributing the property in accordance with the terms of the settlement. On the contrary, the court in this case will distribute the estate according to the will, and thereafter the residuary legatee will pay over to the heirs entitled to share therein the amounts agreed upon by the compromise and settlement. This difference in the facts is not substantial. The controlling fact,

namely, the receipt by the heirs of a part of the estate which would not come to them except for the agreement, remains the same in each case.

The rule of construction so applied, as pointed out by Mr. Justice Holt in the McIntyre case, is not in harmony with the decisions of some of the other state courts, 26 R. C. L. 232, and citations, though it is supported by courts of high standing. The cases are cited in the former opinion. But we prefer the view of the statute as construed in that case as the most consistent with the legislative purpose to impose the tax upon what is in fact received, and not upon what the letter of the will grants but is not received. In that view it is immaterial whether the legatees by the compromise agreement receive more or less than that given by the will; the amount actually received will measure their liability for the inheritance tax. The legatee, who yields up a portion of his legacy in consideration of the settlement and to avoid litigation, must be deemed as renouncing his legacy to the extent shown by the settlement, leaving the amount thereof a part of the estate, and those who receive it, whether by formal decree of the court or by the settlement standing alone, should pay the tax thereon. The legatee who thus renounces a part of his legacy, when not exempt, to effect a settlement of a bona fide controversy, should not be penalized therefor by being compelled to pay a tax on what he so in effect turns back to the estate. The law favors compromises of the kind. 26 R. C. L. 232; State v. Probate Court of Kandiyohi County, 143 Minn. 77, 172 N. W. 902. In the case at bar the residuary legatee, St. Olaf's College, a religious and educational corporation of the state, is exempt from the tax. Chapter 410, p. 479, Laws 1919. But the exemption is personal and ceased and terminated by the settlement as to the portion of the legacy renounced. Those acquiring it by that agreement are in the same position, so far as the tax is concerned, as though it had come to them originally. If the estate in the hands of the college had not been exempt and the same settlement had been made, it would have been compelled under the rule applied by the probate court to pay a tax upon two or three hundred thousand dollars it did not in fact receive, and which it relinquished and surrendered to the estate in order to bring about the settlement and avoid prolonged litigation. Under the rule adopted the

tax falls upon those who receive the property, and in proportion as it comes to them. That seems just, it seems fair, is consistent with every legitimate claim of the state, and places the burden of the tax where it rightly belongs.

The order of the probate court will be reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

It is so ordered.

ALBERT PIPER v. MONARCH ELEVATOR COMPANY.[1]

December 9, 1921.

No. 22,586.

Warehouseman — weight slip not within prohibition of statute.

1. A scrap of paper giving the gross and net weight of a load of grain delivered at a public grain warehouse, handed to the person delivering the load, by the warehouseman, and not intended to evidence a storage contract, but merely as a temporary check until proper storage tickets were made out, does not come within the provision of section 4481, G. S. 1913, prohibiting the reception in evidence in a civil action of any slips, memoranda or other form of receipts embracing a storage contract different from that prescribed by the statute.

Decision sustained.

2. No error is discovered in the record.

Action in the district court for Polk county to recover $140.60 for a load of wheat sold and delivered. The answer was an express denial of any indebtedness. The case was tried before Watts, J., who when plaintiff rested denied defendant's motion to dismiss the action, and a jury which returned a verdict in favor of plaintiff. From an order denying its motion for a new trial, defendant appealed. Affirmed.

H. A. Libby, for appellant.

N. B. Moran and *W. E. Rowe,* for respondent.

[1]Reported in 185 N. W. 511.

HOLT, J.

Plaintiff claimed that he delivered a load of wheat to defendant for which he had not been paid. He obtained a verdict. Defendant appeals from the order denying a new trial.

Plaintiff is a farmer near Harold, Minnesota, where defendant operates a grain elevator or public warehouse. When he threshed, in the latter part of August, 1920, the grain was hauled from the machine to the elevator, each load being weighed when received and a slip given the driver, stating the gross and net weight and, generally, the dockage. When plaintiff wished to settle, these slips were surrendered, ordinary storage tickets issued, and a sale concluded if so desired. Many loads of Durum and Marquis wheat were delivered by plaintiff to defendant on and between August 23 and 28. All have been settled for, except the load in suit which was claimed to have been delivered on the evening of August 27. Plaintiff produced a slip, Exhibit A, which his evidence tended to show was given the driver, by defendant's agent, at the time the load was delivered at the elevator. The scale book of defendant does not show the receipt of this load. All the other loads delivered were entered thereon. The evidence is such that it was properly left to the jury to determine whether or not Exhibit A was given to plaintiff's driver by defendant's agent upon the delivery of a load of wheat at the elevator, provided the reception in evidence of the exhibit was not inhibited by section 4481, G. S. 1913.

The section cited is found among the provisions pertaining to local public warehouses. It regulates the storage of grain, gives the form of the receipts that must be issued therefor, and provides for a stub record of such receipts to be kept by the warehouseman, and proceeds: "The receipts shall be consecutively numbered and delivered to the owner immediately upon receipt of each lot or parcel of grain giving the true and correct grade and weight thereof. Any provision or agreement in such receipt not contained in the aforesaid specific warehouse and storage contract shall be void. The failure to issue receipt as directed, or the issuance of slips, memoranda or any other form of receipt embracing a different warehouse or storage contract, shall be deemed a misdemeanor, and no such slip, memoranda, or other form of receipt

shall be admissible in evidence in any civil action." The last sentence came into the statute by chapter 302, p. 451, Laws 1905. And defendant plausibly argues that the decision filed in January, 1904, in Kramer v. Northwestern Elev. Co. 91 Minn. 346, 98 N. W. 96, where slips like Exhibit A were held admissible "unless prohibited by statute" [p. 349], prompted legislative action to meet attempts to defraud public warehousemen. But we cannot give the all inclusive meaning to the statute contended for by defendant. The slips, memoranda or receipts which a warehouseman is forbidden to issue and courts to admit in evidence are slips, memoranda or receipts embracing a storage contract different from the one prescribed. Exhibit A does not purport to evidence any contract whatever. It contains merely some figures, the name "Bert Piper" and "Wht. No. 4." It was not intended as a storage contract, nor to evidence any sort of an agreement. There was no attempt to prove any storage contract. We do not think the learned trial judge erred in overruling the objection to the reception of Exhibit A in evidence. Considered with the other testimony in the case, the verdict cannot be said to be without sufficient support.

There are errors assigned on rulings in respect to other exhibits offered by defendant, but no reference is made to the place in the record where such rulings were made, and we have been unable to find any except where a storage ticket was offered. This was correctly excluded, for there was no evidence that it had ever been delivered to plaintiff or shown to him.

The order must be affirmed.

STATE v. WALTER E. MOSES.[1]

December 9, 1921.

No. 22,706.

Criminal law — corroboration of witness — complainant's letter inadmissible.

In a criminal prosecution the state offered in evidence in corrobora-

[1]Reported in 186 N. W. 303.

tion of the testimony of the complaining witness a letter written by him two years before the trial, containing the statement of a fact upon a vital issue in the case, to the same effect as testified to by him on the trial. It is *held* that the admission of the letter was error; a witness cannot thus be corroborated.

Defendant was indicted by the grand jury of Watonwan county charged with the crime of burglary, tried in the district court for that county before Comstock, J., and a jury and found guilty as charged in the indictment. From the judgment entered pursuant to the verdict, defendant appealed. Reversed.

Regan & Grogan, for appellant.

Clifford L. Hilton, Attorney General, and *J. L. Lobben,* County Attorney, for respondent.

QUINN, J.

The complainant, A. L. Kunz, resided upon a farm in Riverdale township, Watonwan county, this state, on May 17, 1919. He had 10 little pigs shut up in a horse barn on the premises, weaning them from their mother. Between 8 and 9 o'clock in the evening of that day he went to the barn, saw the pigs, closed and latched the barn door to prevent them from getting out, then took his automobile to the house for his family for the purpose of going to Madelia. Daniel Laird, the hired man, was a tiler. He was in the machine shed at the time, changing his clothes, and when ready he got into the car and they immediately started for Madelia, returning about 11:30, when they found the barn door open, but they did not look to see whether or not the pigs were in the barn. On the following morning five of the pigs were missing. On May 19, 1919, Kunz wrote the letter Exhibit D, and mailed it to the sheriff of the county, informing him that five pigs had been taken from his barn on the Saturday night before. Nothing further was done until September, 1920, when defendant was accused of having in his possession for sale some stolen chickens. He confessed in this matter and paid a fine of $75 and costs. The defendant's age does not appear, but he was not living at home with his parents. His father and the deputy sheriff persuaded him to tell the truth about the chick-

ens and to make a clean statement of all his misdeeds. He then admitted taking Kunz' pigs, a warrant was issued against him for petit larceny and he paid a fine of $75 and costs, his father paying Kunz $30 for the pigs. Thereafter an indictment was returned by the grand jury of Watonwan county, charging the defendant with burglary in the third degree committed by entering the barn referred to for the purpose of taking the pigs therefrom. The cause came on for trial at the May, 1921, term of the district court and a verdict of guilty was returned against the defendant. He moved for a new trial upon the ground that the verdict was not justified by the evidence, for errors of law occurring at the trial and upon the ground of newly discovered evidence.

The record is not in satisfactory shape. However, it clearly appears that the issue upon the trial resolved itself into one question, whether the defendant entered the barn at the time of taking the pigs on May 17, 1919. The prosecution relied almost entirely upon the statements of the defendant in proving a case against him. There was no direct testimony that he was near the barn on the night in question. He testified in his own behalf and appears to have made a clean statement of the affair. He said that he met the complainant as contended for by the state; that there was a young man riding with him in his Ford car whom he took home and upon his return, when passing the complainant's house, he noticed that his car needed some water; that he drove in near the pump in front of the house, took a pail from the porch and put water into the radiator of the car; that he saw five little pigs with their mother lying in the yard; that he picked them up, put them into his car and took them away; that the mother of the pigs seemed to be lame or crippled, because she did not get up or make any fuss when he took the pigs. He denied going into the barn where the complainant claims the pigs were kept.

In support of his motion for a new trial on the ground of newly discovered evidence, defendant caused the affidavit of Daniel Laird, the hired man, to be filed. From that affidavit it appears that, in the evening of May 17, Mr. Kunz asked Laird to go to town with them; that Laird kept his clothes in the machine shed and went there to change them; that Kunz came to the machine shed from the barn to get the

automobile in which they were to drive to Madelia; that he then drove the automobile up to the house; that, after finishing dressing, Laird went into the barn at the east door; that there were a number of little pigs running around in the barn; that he remained in the barn several minutes and came out by the same door; that he immediately went to the house, got into the automobile and they drove away; that he did not remember whether or not he closed the barn door; and that he was the last one in the barn before they drove to Madelia. He further stated that on the evening in question there was a crippled sow in the yard near the pump; that she was unable to use her hind legs and that she had lain in that position for several days, and that in November, 1920, he went to the state of Illinois and remained there until May, 1921.

The motion for a new trial upon the ground of newly discovered evidence is not sufficiently supported by a showing of diligence and compliance with the rules governing such matters to justify the granting of a new trial.

Upon cross-examination complainant was interrogated as to whether the pigs were taken from the barn. To rebut the inference which might be drawn from the circumstances of making the complaint before the justice charging the accused with petit larceny, the letter, Exhibit D, was offered, and certain portions thereof received in evidence over defendant's objections. The portions admitted in evidence were the date lines, address and the first sentence which was as follows: "I had five shoats taken out of my barn Sat. night while my family and I were in Madelia." That was a declaration of complainant upon a vital issue of the case, namely, whether the pigs were taken from the barn or farm yard, made by him some two years before the trial of this cause and clearly inadmissible. Pope v. State, 168 Ala. 33, 53 South. 292; Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L.R.A. 341, 36 Am. St. 295; 40 Cyc. 2787. The ruling upon the admissibility of the letter was therefore error for which a new trial must be granted.

Reversed.

STATE EX REL. JAMES WHALEN v. MARY EMRICK.[1]

December 16, 1921.

No. 22,323.

Habeas corpus — custody of child awarded to grandmother.

The evidence adduced in this court is *held* to show that the best interest of the child requires that its care and custody be awarded to his grandmother instead of to his parents.

Upon the relation of James Whalen the district court for Otter Tail county granted its writ of habeas corpus directed to Mary Emrick. The court Parsons, J., made findings and ordered that relator was entitled to the custody of his boy, subject to certain conditions. From the order awarding the child to relator, Mrs. Emrick appealed. Writ quashed; care and custody of child awarded to Mrs. Emrick.

Jesse A. Schunk, for appellant.

Leonard Eriksson, for respondent.

HOLT, J.

Habeas corpus by the father, James Whalen, to secure the custody of his child Gilbert. The court below awarded him to relator. The respondent, Mrs. Emrick, appeals.

Gilbert was born February 21, 1913, at the home of Mrs. Emrick, who is the mother of James Whalen. Neither James Whalen nor Julia Formiller, the mother of Gilbert, was then 18 years of age. James had employment, but the salary was small, and he could not well care for the child, neither could its mother. Mrs. Emrick came to the rescue and agreed to keep and care for Gilbert. A year and eleven months thereafter James and Julia were married. When this cause was heard three other children had been born to them. In 1919 Mrs. Emrick visited her son and his wife in Berlin, Wisconsin, where they live. At

[1]Reported in 185 N. W. 658.

that time difficulty arose over the custody of Gilbert. It was finally adjusted by a written agreement under which Mrs. Emrick was to keep the boy, but was to bring him to visit his parents for one or two weeks each year. Mrs. Emrick, evidently, became so attached to the boy that she could not endure the thought of bringing him to his mother again, for fear that another attempt might be made to take him away, and so, on some pretext or another, she did not bring Gilbert to Berlin when requested, and finally sought to legally adopt him in this state, where she lives. This move on Mrs. Emrick's part invited this proceeding.

There is no question of the financial ability of either party to rear the boy. Although James Whalen has not yet accumulated any property, except household goods, he has been an employe of a leading bank in Berlin, Wisconsin, for 9 years, and has advanced to the position of assistant cashier, his earnings amounting to about $1,800 a year. Mrs. Emrick has some means of her own, and Mr. Emrick, who also appears desirous of keeping Gilbert, owns property of considerable value.

The hearing in this court is de novo. The case was submitted upon the testimony taken in the court below and the deposition of Mrs. Emrick's husband, taken afterwards. The law is well settled that the parents are entitled to the care and custody of their child, unless it is shown that the best interests of the child demand a different disposition. The learned district judge, who heard the case in the first instance, awarded the custody to relator, the father, and we would without hesitancy have reached the same result upon the evidence then adduced. However, we have now the testimony of Mr. Emrick, whose nonappearance at the hearing in the court below weighed somewhat against Mrs. Emrick's claim. Still we would not be inclined to change the decision reached by the district court because of what Mr. Emrick's deposition discloses in respect to his financial standing, his character or feeling towards Gilbert. But, attached to his deposition are two letters, written by Mrs. Whalen to Mrs. Emrick, which disclose such a condition in her married life that we are forced to the conclusion that it will not be for the best interest of Gilbert, or any child, to be reared in the atmosphere of that home. The letters, if true, reveal such depravity of

the relator towards his wife that no child could hope to be properly brought up in their home, and, if not true, they disclose such vileness of mind and viciousness of character on the part of the wife as to make it impossible for a court to place a child under her dominion. The letters are unprintable.

Our conclusion is that the writ should be quashed; Mrs. Emrick to retain the care and custody of Gilbert.

So ordered.

FRANK JANDERA v. LAKEFIELD FARMERS UNION AND ANOTHER.[1]

December 16, 1921.

No. 22,444.

Attachment — charges in affidavit not traversed need not be proved.

1. Where the defendant fails to traverse the charges in an affidavit for attachment, the rule requiring plaintiff to prove such charges by further evidence does not apply.

Charges sustained by evidence.

2. The evidence sustains the finding that the grounds for the attachment set forth in the affidavit therefor are true.

Assignee of debt may attach for fraud in contracting.

3. A cause of action for fraud is assignable, and the assignee of a debt may maintain an attachment based on the ground that the debt was fraudulently contracted.

Action in the district court for Jackson county to recover $1,000 on three checks. The motion of defendant's trustee in bankruptcy to set aside the writ of attachment was denied, Dean, J. From the order denying the motion to vacate the writ of attachment, defendants appealed. Affirmed.

H. L. & J. W. Schmitt and *H. W. Volk,* for appellants.

O. Thoreson, for respondent.

[1]Reported in 185 N. W. 656.

TAYLOR, C.

On June 10, 1920, plaintiff sold and delivered to defendant at its elevator in Lakefield two loads of grain, and received in payment therefor two checks drawn by defendant on the First National Bank of Lakefield. On the same day William Jandera sold and delivered to defendant, at the same elevator, one load of grain, and received in payment therefor a check drawn by defendant on the same bank. The bank refused to pay the checks on the ground that defendant had no funds therein. Thereafter William Jandera assigned and transferred his check together with all rights of action thereon to plaintiff. On July 2, 1920, plaintiff brought suit on the three checks, and on an affidavit charging that the indebtedness "was fraudulently contracted, and that defendant is about to dispose of its property with intent to hinder and delay its creditors," caused an attachment to be issued under which a levy was made on certain real estate of defendant on the same day. On January 3, 1921, defendant was duly adjudged a bankrupt, and on January 25, 1921, Emil Schoyen was duly appointed its trustee in bankruptcy and thereafter duly qualified as such trustee. On March 3, 1921, the trustee in bankruptcy made a motion to be substituted as defendant in this action and to vacate the attachment. On March 16, 1921, the court filed its order denying both motions. The trustee appeals.

Plaintiff's claim was admitted at the hearing on the motion, and the only question presented on this appeal is whether the court erred in refusing to vacate the attachment.

It is urged that the attachment should have been set aside because plaintiff failed to submit any further affidavits in support of it, and Jones v. Swank, 51 Minn. 285, 53 N. W. 634; Schoeneman v. Sowle, 102 Minn. 466, 113 N. W. 1061; and Tereau v. Madison, 135 Minn. 469, 160 N. W. 1024, are cited in support of this contention. The facts do not bring this case within the doctrine of those cases. Here the trustee, aside from the evidence offered in support of his claim that the order for the issuance of the writ was void because the court commissioner who made it was not court commissioner at that time—a claim not urged on this appeal—merely presented his own affidavit and the

testimony of the manager of the defendant corporation, which was taken orally at the hearing. The affidavit of the trustee contains nothing traversing the charge made in the affidavit for the attachment.

From the testimony of the manager it appears that he purchased this grain and issued these checks; that defendant had no funds in the bank at that time and was then hopelessly insolvent; that immediately thereafter the bank caused an attachment to be issued under which it closed defendant's elevator and took the grain for which these checks were issued; that defendant did not resist the attachment procured by the bank, and that after the levy had been made under that attachment plaintiff procured his writ and caused a levy to be made thereunder on the real estate on which the elevator was located. The manager states that when he issued the checks he did not know that defendant had no funds in the bank and believed that the checks would be paid. It further appears from the manager's testimony that defendant, in addition to its elevator, operated a lumber-yard and owned an old tile factory; that before plaintiff procured his writ defendant's president, A. V. Everett, had given an option contract for the sale or lease of a parcel of trackage property owned by it on the opposite side of the track from its elevator, and had shipped a carload of machinery from the tile factory to a plant owned by himself; that the only compensation to defendant for this machinery was a charge against Everett, on the books, of $100, although "it was worth a whole lot more;" that, when plaintiff's attachment was issued, Everett was endeavoring to sell all of defendant's property, and that, after plaintiff's attachment had been levied, Everett took the lumber on hand and removed it from the lumber-yard and had himself charged on the books of the corporation with some $1,400 or $1,500 as the purchase price of the lumber.

Both parties seem to have relied on the testimony of the manager as supporting their respective contentions. Although the trustee had procured an affidavit from Everett, the president of the corporation, it was not served on plaintiff nor presented to the court at the hearing, and is not a part of the record.

From the facts disclosed at the hearing the trial court found that

"the grounds upon which said writ of attachment was issued, as set forth in the affidavit for attachment herein, are true;" and our examination of the record satisfies us that the court was fully justified in reaching that conclusion.

The trustee contends that the testimony of the manager shows an absence of intent to defraud. The manager knew that the defendant was indebted in an amount exceeding the total value of all its assets, and no attempt was made to explain how it happened that he failed to know that defendant had no funds in the bank, or why he believed that the checks would be paid. We simply have his bare statement that he did not know that there were no funds and believed the checks would be paid. Furthermore there is no showing that the president of the corporation, who seems to have been its controlling executive officer, was not fully cognizant of the exact situation. Issuing a check, knowing that the maker has no funds or credit with the bank sufficient for its payment, is prima facie evidence of intent to defraud. Chapter 94, p. 92, Laws 1919.

The trustee further contends that the attachment cannot be sustained on the charge that the debt was fraudulently contracted, for the reason that the ground for the attachment must exist in respect to all the claims sought to be enforced under it, and that the right of William Jandera to proceed by attachment, arising out of the fraud perpetrated on him, was personal to himself, did not pass to plaintiff, and plaintiff cannot maintain an attachment based thereon. There are cases holding that the assignee of a debt cannot maintain an attachment based on the ground that the debt was fraudulently contracted, but these decisions rest on the common-law rule that a cause of action for fraud is personal to the one defrauded and cannot be assigned by him. This rule has been abrogated in Minnesota. Any cause of action which survives the death of the holder is assignable. Dunnell, Minn. Dig. and 1916 Supp. § 564. All causes of action except those arising out of an injury to the person survive. G. S. 1913, § 8174. A cause of action arising out of fraud or deceit is not a cause of action for injury to the person, but a cause of action for injury to a property right, and is assignable. Guggisberg v. Boettger, 139 Minn. 226, 166 N. W. 177; Hansen Mer-

cantile Co. v. Wyman, Partridge & Co. 105 Minn. 491, 117 N. W. 926, 21 L.R.A.(N.S.) 727. But, even if the objections to the claim that the debt was fraudulently contracted were well taken, the finding that defendant was about to dispose of its property with intent to hinder and delay its creditors is sufficient to sustain the attachment.

Order affirmed.

HAROLD CARLSON, A MINOR BY AND THROUGH HIS GUARDIAN, PETER G. ANDERSON v. JOHN BARTON PAYNE, AS AGENT, ETC.[1]

December 16, 1921.

No. 22,517.

Master and servant — negligence of master sustained by evidence.

1. The evidence is sufficient to sustain the finding that plaintiff's injuries resulted from the negligence of defendant.

Charge to jury — contributory negligence.

2. The instruction in respect to contributory negligence was sufficiently favorable to defendant.

New trial — verdict excessive.

3. The verdict is excessive and a new trial is granted, unless plaintiff shall consent that it be reduced to the sum of $45,000, in which event a new trial is denied.

Action in the district court for Hennepin county to recover $75,000 for injuries received while in the employ of the Great Northern Railway Company. The amended answer alleged contributory negligence and assumption of risk. The case was tried before Bardwell, J., and a jury which returned a verdict for $57,789.77. From an order denying its motion for a new trial, defendant appealed. Affirmed.

Dille, Hoke, Krause & Faegre, for appellant.

Olof L. Bruce, for respondent.

[1]Reported in 186 N. W. 291.

TAYLOR, C.

The plaintiff recovered a verdict of $57,789.77 for personal injuries and the defendant appeals from an order denying a new trial.

The action was brought under the Federal Employer's Liability Act. The accident happened while the crew of which plaintiff was a member were engaged in making up a train in the yards of the Great Northern Railway Company in the city of Minneapolis. The engine was pushing a string of cars from the lead track upon a switch track. Plaintiff was riding the head car for the purpose of setting the brakes after a part of the cars had been uncoupled from the remainder of the train. He claims that the foreman of the crew signaled the engineer to slow down; that instead of doing so the engineer set the brakes and brought the engine to a sudden stop, and that this gave such a violent, unusual and unexpected jerk to the car on which he was riding that he was thrown over the end of it upon the track. The wheels of the car passed over his arms, crushing them so badly that it was necessary to amputate both arms between the elbow and shoulder.

The defendant, in effect, concedes that the plaintiff presented evidence tending to show that the accident resulted from a violent and unusual jerk caused by the negligence of the engineer in applying the brakes as in an emergency stop, instead of merely slowing down as directed by the signal, but argues that the evidence that the engineer simply slowed down in the manner usual and expected in such cases is so much more reasonable that the court ought not to allow the finding of negligence to stand. This finding is supported by direct and positive evidence, and, under long established rules, the conclusion reached by the jury cannot be disturbed.

The defendant challenges the instruction defining the effect to be given to contributory negligence under the Federal statute. This instruction was clearly erroneous, and the plaintiff concedes that it was erroneous. But the instruction, so far as it stated a rule for the guidance of the jury, was more favorable to the defendant than the statute warranted. It must be conceded, however, that the instruction lacked clearness. It is upon this fact that defendant bases his claim of error. The plaintiff insists that there was no evidence of contributory negligence and that the instruction did not affect the result in any way.

The plaintiff testified that he saw the slow down signal and knew that ordinarily it would be followed by a slight jerk of the cars; that he had been instructed that under such circumstances a man on top of a car should stay in the center and be on his guard against the jerk, and that following his usual custom he took a position in the center of the car and braced himself for the usual jerk. He is contradicted to some extent by a witness who saw him at the instant of the accident, and who testified that he appeared to be walking toward the brake on the front end of the car. From this evidence the jury might, perhaps, have found that he was guilty of contributory negligence in failing to take the usual precautions to guard against the expected jerk. But the claim that he was guilty of contributory negligence, although alleged in the answer, does not appear to have been urged to any appreciable extent during the trial. The defendant based his defense on the ground that there was no negligence in operating the train and that the injury resulted from a risk assumed by plaintiff, and seems to have placed little, if any, reliance on the claim of contributory negligence. Neither party made any request for instructions, and neither took any exception, at the trial, to the instructions as given, or called the attention of the court to the ambiguity and lack of clearness in the language used. In view of all the circumstances and of the fact that the definite statements in the instruction were unduly favorable to the defendant, we think he could not have been prejudiced by the fact that some of the language used may have been so indefinite as to convey little or no meaning to the jury.

Defendant relies mainly on the contention that the verdict is excessive. The verdict is for $57,500 with an additional allowance of $289.77 for fees of doctor, hospital and nurse, making a total of $57,789.77. Plaintiff was 20 years of age at the time of the trial, and has a life expectancy of 42.20 years according to the American Experience Table of Mortality. His injuries are very serious. He lost both arms between the elbow and shoulder, and the remaining portion of his right arm is only about six inches in length and of his left arm only about four inches in length. Although artificial arms have been devised of such delicate and ingenious mechanism that unfortunates who have

lost their natural arms accomplish wonderful results with them, yet, if plaintiff were fitted with such artificial arms, the stumps of his natural arms to which they would be attached are so short that it is problematical to what extent, if at all, he would be able to make a beneficial use of them. He requires an attendant to feed him, to dress and undress him, and to attend to his personal needs. He made a good recovery and is in good health aside from the loss of his arms. He is entitled to very substantial damages, but the amount awarded is considerably larger than has ever been sustained by this court for any sort of a personal injury. While there are many injuries for which money is no compensation, yet, as said in Padrick v. Great Northern Ry. Co. 128 Minn. 228, 150 N. W. 807, L.R.A. 1915F, 1, it is apparent that legislatures or courts must, on grounds of public policy, place some limit upon the amount of recovery in such cases. After a careful consideration of the matter, we have reached the conclusion that there should be a new trial, unless plaintiff shall consent to reduce the verdict to the sum of $45,000. This sum is larger than has ever before been sustained by this court. If it were put at interest at the rate of 6 per cent it would produce an annual income of $2,700, if at the rate of 5 per cent an annual income of $2,250, and still leave the principal intact.

The order appealed from is reversed and a new trial granted, unless, within 10 days after the filing of the remittitur in the court below, the plaintiff shall file a written consent that the verdict be reduced to the sum of $45,000. In the event that such consent be filed within the time stated the order shall be and is affirmed.

DIBELL, J. (dissenting).

The extent of the plaintiff's injuries is accurately stated in the prevailing opinion. His physician says he will always require an attendant. We can think in terms of hope, in view of the results that are being accomplished in the rehabilitation of maimed men, of a time when he will be able to make serviceable use of the stumps of his arms in caring for himself, and that he may be able to do useful service in some line of endeavor, and that his life will not be devoid of enjoyment or usefulness. My own view is that he will do many things, and that his

disability will not be as great as is claimed in his behalf. Much depends upon his ambition and determination and natural aptitude. The award is of a large amount for a great disability. I am content that the composite judgment of a jury of practical men, approved by the trial court, fix the damages, and so I dissent from a reduction.

LENA MOEN v. ENOC A. OLSON AND CHRISTINA OLSON.[1]

December 16, 1921.

No. 22,524.

Verdict not excessive.

1. A verdict for $400 in a personal injury action cannot be held so excessive as to indicate that the jury acted under the influence of passion or prejudice, where there is evidence that plaintiff received wounds that confined her to her bed for four or five weeks and that after more than a year's time she continues to suffer pain.

Questions for jury.

2. The issues of plaintiff's contributory negligence and defendants' negligence were properly left to the jury's determination.

Action in the district court for Beltrami county to recover $5,000 for injuries resulting from defendant's careless driving of his automobile. The case was tried before Stanton, J., who when plaintiff rested denied defendants' motion for a directed verdict, and a jury which returned a verdict for $400. From an order denying their motion for judgment notwithstanding the verdict or a new trial, defendants appealed. Affirmed.

Charles W. Scrutchin, for appellants.

John L. Brown, for respondent.

HOLT, J.

The appeal is by defendants from the order denying their motion in

[1]Reported in 185 N. W. 940.

the alternative for judgment notwithstanding the verdict or for a new trial.

As plaintiff was about in the center of a block on the westerly sidewalk of Bemidji avenue in Bemidji, Minnesota, she noticed a Mrs. Evert coming, driving south in an automobile. She hailed her. Mrs. Evert stopped, the car being about 15 feet from the westerly curb of the street. Plaintiff stepped out to ask for a ride. She came within three feet of Mrs. Evert, and, when informed that the latter was not intending to drive in the desired direction, turned to go back to the sidewalk. At that moment defendants in an automobile approached behind Mrs. Evert, and, passing between her car and the sidewalk, struck plaintiff, inflicting injuries for which she recovered a verdict of $400.

We cannot hold that the size of the verdict indicates that the jury were under the influence of passion or prejudice. Plaintiff received two wounds on her neck and head, which bled profusely; she was stunned or unconscious for a short time and was confined to her bed for five or six weeks. She testified that previous to this occurrence she was healthy and free from aches, but that since and up to the trial, over a year after, she feels pain in the back and head. The learned trial court below, who had the advantage of observing plaintiff, did not consider her recovery excessive, and the record does not justify this court in reaching a different conclusion.

It is further contended that the court erred in refusing to direct a verdict for defendants and in denying their motion for judgment non obstante, on the ground that no actionable negligence was proven against them and that plaintiff's contributory negligence appears as a matter of law. The complaint charged that defendants carelessly and negligently drove their car to the left of Mrs. Evert's and against plaintiff. The latter's car was headed south. Defendants came up behind her. They should have passed to her left. They passed to her right, and at high speed, according to plaintiff's evidence. They had full view of plaintiff's position. There can be no question but that defendants' negligence was for the jury.

We think the same must be said in respect to the defense of con-

tributory negligence. Plaintiff testified that she looked to the north when she left the sidewalk to speak to Mrs. Evert. She tarried but a moment, and, as she turned around to go back, was struck. It is not disclosed whether in turning she faced to the north or to the south. However that may be, considering that she looked to the north and saw no automobile approaching when she stepped off the sidewalk, that she remained but a moment before she turned to go back, and that she could to some extent rely on the proposition that drivers of vehicles going south would obey the law and not pass Mrs. Evert's car to its right, we think the defense of contributory negligence was a jury question.

The order must be and is affirmed.

KATE KEARNS v. NORTH AMERICAN LIFE & CASUALTY COMPANY.[1]

December 16, 1921.

No. 22,527.

Insurance— waiver of notice of illness.

1. An insurer may waive a statutory provision, incorporated in its policy, for written notice of sickness of the insured to entitle her to claim benefits under the policy. By refusing to pay the claim, on the ground that the policy had lapsed for nonpayment of the premium, such notice is waived.

Letters of president admissible.

2. The letters of the president of the insurer, refusing to recognize the claim on the ground stated, were properly received in evidence under the circumstances stated in the opinion, although a waiver had not been pleaded.

Effect of waiver of statutory notice.

3. A waiver of the notice prescribed by section 3524, G. S. 1913 (C): 4 and 5, conferred upon the insured the rights she would have had if such notice had been given.

False answer in application — knowledge of agent.

4. Knowledge on the part of the representative of the insurer of the falsity of an answer to a question in the application for the policy, which

[1]Reported in 185 N. W. 659.

he reduced to writing, is imputed to the insurer, and it will not be allowed to avoid its contract because of the misstatement in the application.

Construction of policy.

5. The right to benefits was not limited by a provision in the policy relating to complications of the original sickness with other specified diseases.

Action in the district court for Ramsey county to recover $180 upon defendant's health policy. The case was tried before Olin B. Lewis, J., who when plaintiff rested denied defendant's motion to dismiss the action, and at the close of the testimony its motion for a directed verdict and a jury which returned a verdict for $193.05. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Leroy Bowen, for appellant.

Herbert P. Keller and *Bruce J. Broady,* for respondent.

LEES, C.

Appeal from an order denying defendant's motion for judgment or a new trial. Plaintiff sued on a policy insuring her against the results of accidental injuries and sickness from disease, providing for the payment of $30 a month for temporary total disability resulting from sickness, and calling for the payment of an annual premium of $12 in monthly instalments, payable in advance, either at defendant's home office or to an authorized collector.

As defenses the answer alleged that plaintiff failed to pay the premium due May 25, 1919, and the policy thereupon lapsed; that defendant never received notice of plaintiff's sickness and was never requested to furnish forms for proof of loss and never refused to do so; that no proofs of loss had been made and no written notice of plaintiff's alleged sickness given within 10 days as required by the policy, and that plaintiff was insured as an hotel keeper and thereafter changed her occupation to that of a boarding-house keeper, which was more hazardous and not insurable.

The evidence in plaintiff's behalf was substantially to this effect: In the spring of 1919 she was sick for a short time and verbally notified

Edwin Hempel, the defendant's collector, of her sickness. Without further notice and without proofs of loss, defendant paid the amount to which she was entitled. Afterwards and in June, 1919, she cut her finger. An infection followed and an abscess formed in her arm-pit, and later rheumatism or neuritis developed. On June 16 she became so ill she was totally disabled. On June 25 Hempel called to collect certain premiums and had an interview with plaintiff's daughter, who told him of her mother's sickness and asked him whether it would be necessary to give notice to the company. He replied it was not necessary, that he would look after the matter as he had done before, but refused to accept the June premium on plaintiff's policy. Subsequently the premium was paid to defendant's collector at St. Paul, who gave a receipt for it. Defendant promptly returned the premium. Correspondence between plaintiff's attorney and the defendant followed, beginning August 30, 1919, when demand was made for payment of plaintiff's claim. Defendant wrote in reply that the premium due May 25 was not paid, and consequently the policy lapsed on that day; that, if it should appear that the premium was paid, defendant's officers would be in a position to discuss the claim on its merits. Defendant adhered to its position in subsequent letters, and finally suit was brought.

1. The evidence with reference to the payment of the premium was such that the jury was justified in finding it had been made. Defendant does not seriously dispute this, and we pass this phase of the case without further comment.

2. It must be conceded that the requirement of written notice of sickness might be waived. It is well settled that, where the insurer denies liability on grounds other than a failure to furnish notice or proofs within the proper time, there is a waiver of such failure. Zeitler v. National Casualty Co. 124 Minn. 478, 145 N. W. 395; Johnson v. Bankers M. C. Ins. Co. 129 Minn. 18, 151 N. W. 413; L.R.A. 1915D, 1199, Ann. Cas. 1916A, 154; 14 R. C. L. p. 1349; 1 C. J. p. 480. The evidence would warrant the jury in finding that on June 25, within the 10-day period, Hempel received notice of plaintiff's sickness, similar to that given in the spring, when defendant paid her claim without questioning the sufficiency of the notice. Under such circumstances plaintiff might be justified in assuming that verbal notice to Hempel was all the defend-

ant required. If she was led to believe that strict compliance with the terms of the policy would not be required, defendant might be estopped from contesting liability because of her failure to give written notice. However that may be, it is clear that, when defendant refused to pay the claim on the ground that the policy had lapsed, it waived plaintiff's failure to give written notice of her sickness.

The legislature has prescribed standard provisions for health and accident insurance policies, one covering the notice to be given to the insurer. Such a provision may be waived, though contained in the statute. Lake Superior P. & C. S. Co. v. Concordia F. Ins. Co. 95 Minn. 492, 104 N. W. 560. We agree with appellant's counsel that it is important that notice should be given promptly. It is necessary to give the insurer an opportunity to make timely investigation and guard against trumped-up claims, made when it is too late to ascertain the true state of facts. In the instant case, however, want of notice was not the ground on which defendant saw fit to place its refusal to pay.

3. Objection was made to the admission in evidence of letters stating defendant's reason for refusing to pay. It is urged that, while these letters were received to show a waiver of written notice, a waiver was not pleaded. The complaint alleged that notice was given within 10 days and that plaintiff had duly complied with all conditions of the policy she was required to perform. In Hand v. National L. S. Ins. Co. 57 Minn. 519, 59 N. W. 538, it was intimated that, under an allegation of performance of conditions precedent, evidence of waiver or excuse for nonperformance is not admissible. It was held, however, that, if evidence from which a waiver may be inferred is introduced without objection, no point can subsequently be made of the omission to plead waiver. Under cross-examination, defendant's president testified, without objection, that plaintiff's claim would not have been recognized even if she had given written notice of it, because she was not insured after May 25. He added there were other reasons for refusing to pay the claim, but did not give them. The objection made to the letters was that they were written after the expiration of the 10-day period prescribed by the policy and did not show waiver of notice. The objection that they were not admissible under the pleadings was not made. There was no error in receiving them.

4. Another contention is that there can be no indemnity for sickness prior to August 30, when written notice of the plaintiff's claim was made. Section 3524, G. S. 1913, prescribing standard provisions in policies of health and accident insurance, contains two clauses reading:

"(C):—4. Written notice * * * of sickness * * * must be given to the insurer * * * within ten days after the commencement of disability from such sickness.

"(C):—5. Such notice given * * * to the insurer * * * with particulars sufficient to identify the insured shall be deemed to be notice to the insurer. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

By reference, these provisions were made part of the policy and were followed by a provision that the company's liability should begin only on the date when written notice was given. In our opinion this provision has no application where notice has been waived. We think the waiver of notice conferred upon plaintiff the same rights she would have had if written notice had been given.

5. In her application, plaintiff's occupation was given as an hotel keeper. In fact she was a boarding-house keeper. Hempel prepared the application. He testified she told him she kept an hotel. She denied it. The application was made out at her boarding-house. Hempel visited it frequently to collect premiums from her and her boarders. There was a boarding-house sign on the building. Hempel admitted he knew it was an ordinary boarding-house. It is clear that he had knowledge of the falsity of the answer he wrote for plaintiff in the application. His knowledge is imputed to the defendant and it will not be allowed to avoid its contract on that ground. Bemis v. Pacific C. C. Co. 125 Minn. 54, 145 N. W. 622; 2 Dunnell, Minn. Dig. § 4681; 7 Cooley, Briefs on Ins. 2620, 2622, 2625; 1 C. J. 424; 14 R. C. L. 1159.

6. The policy provided that no indemnities should be paid for a sickness of more than 30 days, when such sickness originated and resulted from, or was occasioned by or complicated with, rheumatism or neuritis. Plaintiff's physician testified that after the abscess formed she developed neuritis and a general rheumatic condition as a result of the infection.

The effect of this testimony was not to limit her right to benefits to a period of 30 days. Neuritis and the rheumatic condition were a consequence of her original ailment and followed from the operation of natural laws of disease. Her sickness was not complicated with them because she was not suffering from them when she developed the infection.

The order appealed from is affirmed.

MICHAEL LUSSNIG AND THERESA LUSSNIG, HIS WIFE v. INVESTORS SECURITY ASSOCIATION AND ANOTHER.[1]

December 16, 1921.

No. 22,540.

Homestead right of wife waived by her joinder in deed.

The evidence sustains a finding that a deed of the homestead of the plaintiffs, husband and wife, was executed by both, and that it was delivered. The contract for the sale of the homestead, in which the wife did not join, was void; but her joinder in the deed, which was intended to be delivered, and which was deposited in escrow, waived her homestead rights upon its subsequent delivery.

Action in the district court for Hennepin county to set aside conveyances made upon an exchange of land. The case was tried before Bardwell, J., who made findings and ordered judgment in favor of defendants for $747.25. From an order denying their motion for amended findings and judgment notwithstanding the verdict or for a new trial, plaintiffs appealed. Affirmed.

Westphal & Ochu, for appellants.

George A. Lewis, for respondents.

DIBELL, J.

Action to set aside certain conveyances made by the plaintiffs to the defendants on an exchange of lands. There were findings for the de-

[1]Reported in 186 N. W. 574.

fendants. The plaintiffs appeal from the order denying their motion for a new trial.

The plaintiffs are husband and wife. On June 27, 1918, the plaintiff Michael Lussnig entered into a contract with one Shircliff, representing the defendant association, for an exchange of lands. Among those which Lussnig was to give was his homestead property in Minneapolis. Mrs. Lussnig did not join in the contract. It was therefore void. She joined in a deed executed by her husband to the association. Her claim is that she did not knowingly sign the deed, but thought she was signing a mortgage in renewal of a mortgage then upon the homestead.

The contract of June 27 provided for putting the deeds in escrow to be delivered upon performance. The trial court found that the deeds were delivered in escrow, and that the defendant performed and received the deed of the homestead. The evidence was such as to justify the court in finding that the wife knowingly signed the deed, intending that it would be delivered in the exchange, and that the husband deposited it in escrow. The joinder of the wife in the deed waived her homestead rights, and a subsequent delivery by the husband in escrow was valid. Knopf v. Hansen, 37 Minn. 215, 33 N. W. 781. The evidence sustains the finding of execution and delivery.

An accounting was had, by consent of the parties, as to certain receipts and expenditures of the parties in connection with the properties exchanged. The claim of the plaintiffs for improvements upon their homestead property was by consent not considered. There is a claim that the defendant received $180 in interest for which it did not account. We do not find proof of this.

Order affirmed.

ERNEST MOORE, SR. v. E. M. LILLEHAUGEN ET AL.[1]

December 16, 1921.

No. 22,545.

Procedure governed by lex fori.

1. The lex fori governs the conduct of litigation in all matters of procedure, including pleading, practice and evidence.

[1]Reported in 185 N. W. 958.

Foreign statute upon registration of cattle brands not evidence of title.

2. The statute of the state of North Dakota on the subject of the registration of cattle marks or brands, the issuance of certificates thereof, and providing that the certificate shall be deemed evidence of ownership of cattle so branded or marked, constitutes a rule of evidence applicable in that state only; it has no extraterritorial force or effect and is inadmissible in this state as evidence of title.

No error shown by record.

3. The record presents no reversible error.

Action in claim and delivery for certain cattle, in the district court for Dakota county, or for $1,450.70 in case delivery could not be had. The case was tried before Converse, J., who at the close of the testimony denied plaintiff's and defendants' motions for directed verdicts, and a jury which returned a verdict in favor of defendants Lillehaugen and Lattimore. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

John A. Pearson, for appellant.

D. L. Grannis, for respondents.

BROWN, C. J.

Action in claim and delivery for 24 head of cattle in which defendants had a verdict and plaintiff appealed from an order denying a new trial.

The cattle were shipped by defendants Lillehaugen and Lattimore from North Dakota to the South St. Paul Stock Yards in this state consigned to defendant J. R. Kirk Commission Company for sale on the market at that place. Plaintiff's alleged title and ownership of the cattle, or the proceeds thereof, was put in issue by the answer. It appears that the cattle were branded with the mark "LML," and plaintiff claims to have purchased them in North Dakota from one Mosser, the owner and holder of that mark or brand. Lillehaugen & Lattimore, defendants, purchased them of one Bishop of Benedict, North Dakota, who in turn claimed to have purchased them from the King Cattle Company, of Mandan, that state. The evidence, somewhat conflicting, made the question of ownership one of fact for the jury, and it was answered in favor of defendants. Our examination of the record leads to the conclusion that the verdict is sufficiently supported by the evidence. It would serve no useful pur-

pose to discuss it. It is sufficient to say that we have examined it with the result stated.

It appears that Mosser, through whom plaintiff claims title, had complied with the statutes of the state of North Dakota in reference to the selection and recording in the office of the state commissioner of agriculture a mark or brand for the identification of cattle owned by him, and there had been issued to him by the proper officer a certificate thereof as required by the statute. The mark so selected and certified was "LML," and the cattle in question appear to have been so branded. The official certificate was subsequently assigned to plaintiff by Mosser, and was offered and received in evidence on the trial. At the conclusion of the trial counsel for plaintiff requested the court to instruct the jury to the effect that the certificate was prima facie evidence that plaintiff, the holder thereof by assignment, was the owner of the cattle branded with that mark. The request was refused, to which refusal plaintiff duly excepted. That exception presents the principal question urged in support of the appeal.

The refusal to so instruct the jury was not error. The statutes of North Dakota on the subject of the registration of cattle brands or identification marks, Comp. St. 1913, §§ 2595 and 2596, provide for the filing of a written application with the commissioner of agriculture, the record thereof and proceedings thereunder, and the issuance of an appropriate certificate to the applicant assigning to him and his exclusive use the particular cattle mark or brand, "which record shall be open to the inspection of any person interested, and he (the commissioner of agriculture) shall deliver to the owner of such mark or brand a certificate thereof, which certificate shall be deemed evidence of ownership, for which he shall charge and collect a fee of $2.00."

Whether the statute should be construed as giving to the certificate of registration prima facie evidence of ownership of the cattle branded with the registered mark, or evidence of the ownership of the particular mark, we do not stop to consider. The supreme court of North Dakota has not heretofore considered the question and the authorities elsewhere are perhaps not in entire harmony on the subject. It is not here involved, for, however the statute may be construed, it amounts to nothing more than a rule of evidence applicable in North Dakota, with no ex-

traterritorial force or effect. The certificate is not evidence in this state of either fact stated, namely, the ownership of the cattle or of the mark, therefore there was no error in the instructions of the court of which plaintiff complains. It is a rule of general application that the lex fori governs the commencement and conduct of litigation in all matters of procedure, including pleading, practice and evidence. Jones v. Chicago, St. P. M. & O. Ry. Co. 80 Minn. 488, 83 N. W. 446, 49 L.R.A. 640; 4 Notes on Minn. Reports, 707; Kaufman v. Barbour, 98 Minn. 158, 107 N. W. 1128; Fryklund v. Great Northern Ry. Co. 101 Minn. 37, 111 N. W. 727; 12 C. J. 447, and citations.

Counsel is clearly in error in the contention that the North Dakota statute creates a substantive property right in the holder of the certificate. The statute on its face limits the effect of the certificate to its character as evidence; it therefore constitutes a rule of evidence and nothing more. The rule applicable to a foreign law which forms an element of a contract, as distinguished from a rule of evidence, is pointed out in Thompson-Houston Elec. Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. 536.

This disposes of the principal assignments of error and of the appeal, for we find no error of a character to justify a new trial in any of the other assignments. The deposition of some North Dakota witnesses, taken in that state, was taken and certified under stipulation, and both parties participated in taking the same. It was returned and filed in the court below, but no notice thereof was given as provided for by our statutes. In that situation counsel for plaintiff rightfully interposed objections at the time it was offered in evidence. But we find no special merit in any of the points used against its admission in evidence; there was no substantial defect in the taking or certifying the same. Informalities therein are of an unimportant character and must be disregarded. 1 Dunnell, Minn. Dig. § 2715. There were no errors in the admission or exclusion of evidence to justify a new trial.

Order affirmed.

STATE EX REL. FRANK WINEGAR v. THE DISTRICT COURT OF WASECA COUNTY AND ARTHUR B. CHILDRESS, JUDGE THEREOF.[1]

December 16, 1921.

No. 22,573.

Change of venue — review by mandamus.

1. An order changing the place of trial on the ground that certain non-interested defendants were named to prevent a change on the demand of the only interested defendant, may be reviewed by mandamus proceedings directed to the court making such order.

Decision sustained by evidence.

2. Affidavits presented in support of the motion in this case support the conclusion of the trial court in ordering a change.

After the former appeal reported in 148 Minn. 489, 182 N. W. 513, and upon the relation of Frank Winegar, the supreme court granted its alternative writ of mandamus directed to the district court for Waseca county and the Honorable Arthur B. Childress, judge thereof, to review the order of that court changing the venue of the case. Affirmed.

Moonan & Moonan, for relator.

Jamison, Stinchfield & Mackal, for respondent.

PER CURIAM.

Procedure to procure a writ of mandamus directing the district court of Waseca county to retain the action hereinafter referred to in that county for trial.

In October, 1920, Frank Winegar brought an action based upon contract in the district court of Waseca county, against J. E. Martin, Mike Stopa and three other persons as defendants. Martin resided in Hennepin county and the other defendants in Waseca county. Martin and Stopa answered separately. The other defendants did not answer, nor does it appear that they were served.

[1]Reported in 185 N. W. 1023.

Upon the call of the calendar at the opening of the regular January, 1921, term of court in Waseca county, the case was set for trial, without objection, the attorneys for the answering defendants being present. Five days later the defendant Martin gave notice to plaintiff of a motion for change of venue to Hennepin county, upon the ground that all the persons named as defendants, other than himself, were made parties to the action for the sole purpose of preventing a change of venue. The matter was argued, submitted and an order filed granting the motion. An appeal therefrom was taken to this court where it was held that the order was not appealable and the appeal was dismissed. Winegar v. Martin, 148 Minn. 489, 182 N. W. 513.

Thereafter this proceeding in mandamus was brought to review the order of the trial court so changing the venue on defendant's motion. The only question presented on the merits of the appeal is whether the findings of the trial court that the defendant Stopa was made a party defendant to prevent a transfer of the cause to Hennepin county, are sustained by the evidence. The affidavits have been fully considered, and we reach the conclusion that the decision of the trial court is justified thereby.

In taking leave of the case we hold that the procedure here adopted was proper. The venue was not changed by the demand of the defendant Martin that the cause be transferred to Hennepin county. But the court, subsequent to the demand, made an order changing the venue to that county on the ground heretofore stated, namely, that Stopa was made a defendant solely to prevent a change on the demand of defendant Martin. In that case the procedure here adopted in review of that order is proper. It would be different in a case where the demand itself affects the change of venue. The order is affirmed.

DIBELL, J. (concurring).

I concur upon the ground that State v. District Court, infra, page 498, settles the question of the propriety of mandamus.

STATE EX REL. SECURITY STATE BANK OF WALDORF v. THE DISTRICT COURT OF WASECA COUNTY AND HON. A. B. CHILDRESS, JUDGE THEREOF.[1]

December 16, 1921.

No. 22,574.

Change of venue — intervener in garnishment.

1. In a garnishment proceeding the place of trial may be changed, on the application of the intervener, for convenience of witnesses. In this case the showing sustains the order of the court changing the place of trial.

Mandamus to review decision of question of venue.

2. The writ of mandamus has become a writ of review of orders made by the trial court granting or denying a motion for a change of the place of trial. It may be invoked when the change of the place of trial is a matter of right under G. S. 1913, § 7722, or when, under G. S. 1913, § 7723, the court grants or denies a motion for a change on the ground of the convenience of witnesses, and in determining the motion exercises its judgment and discretion.

Upon the relation of Security State Bank of Waldorf the supreme court granted its alternative writ of mandamus directed to Honorable Arthur B. Childress, judge of Waseca county, directing him to retain for trial the above entitled action brought in that county. Affirmed.

Moonan & Moonan, for relator.

S. B. Wilson, for respondents.

PER CURIAM.

Alternative writ of mandamus to the judge of the district court of Waseca county directing him to retain for trial an action brought in that county.

1. There was a garnishment proceeding in which the Farmers State Bank of Pemberton had intervened and applied for and obtained an order changing the venue to Blue Earth county. The order was made on

[1]Reported in 185 N. W. 1019.

the ground that the convenience of witnesses and the ends of justice would be promoted by the change, and was based on an affidavit stating that the only issue to be tried was one between the plaintiff-relator and the Pemberton bank, that the defendants in the main action resided in Faribault county, the garnishees and the intervener in Blue Earth county, and that Mankato is more accessible than Waseca to all necessary witnesses. The plaintiff bank is located in Waseca county.

Relator contends that the district court had no jurisdiction to enter the order, for the reason that the garnishment proceeding was not an independent action but was incidental to the main action, which had been finally determined, and that section 7723, G. S. 1913, has no application to a controversy between the plaintiff in the main action and a third party brought under section 7869, G. S. 1913. In this we do not concur. Section 7723, G. S. 1913, applies to all civil actions, and a contest such as this is one to enforce and protect a private right, and hence it is a civil action. Section 7673, G. S. 1913; Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794, 6 L.R.A. 338, 18 Am. St. 495. The district court had jurisdiction to change the venue. It is largely within the discretion of the trial court to grant or refuse an application for a change of venue for the convenience of witnesses, and its action will not be reversed unless the case is one where there has been an abuse of discretion. Wilson v. Richards, 28 Minn. 337, 9 N. W. 872. This is not such a case.

2. There is a question as to the propriety of mandamus to review the order of the court changing the place of trial.

In certain cases there is a right of trial in a particular county. G. S. 1913, §§ 7714-7722. In certain other cases the place of trial may be changed by the court when there has been a joinder for the purpose of preventing a change given by the statute of right, or when an impartial trial cannot be had, or when the convenience of witnesses and the ends of justice will be promoted. G. S. 1913, § 7723.

By mandamus the supreme court may require an inferior tribunal to exercise its judgment or to proceed with the discharge of its functions, but it cannot control judicial discretion. G. S. 1913, § 8266. It is an extraordinary legal remedy. It does not correct errors nor control the judgment of a court acting within jurisdiction, nor serve the purpose of

an appeal. As was said in In re Winn, 213 U. S. 458, 468, 29 Sup. Ct. 515, 53 L. ed. 873, "mandamus will not lie to control judgment or discretion where the judgment or judicial discretion is within the limits of jurisdiction," and "writs of mandamus must not be permitted to usurp the functions of writs of error or appeals, or take their place when they offer an adequate remedy to the aggrieved party."

It was early held that the aggrieved party could not appeal from an order denying or granting a motion to change the place of trial, but that such order could be reviewed upon appeal from an order denying a motion for a new trial, or from the judgment. Carpenter v. Comfort, 22 Minn. 539; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872. The inadequacy of such relief is apparent. The desirability of a speedy and final determination of the proper place of trial, before trial, was commented on in Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523, where the cases are reviewed. A practice which does not permit a final determination of the proper place of trial, except on appeal, when, if there has been error in determining it the whole trial, no matter if rightly conducted, goes for naught, is intolerable.

In State v. District Court of Meeker County, 77 Minn. 302, 79 N. W. 960, it was held that where defendant complied with the law as to the change of venue, where he was entitled as of right to it, the place of trial being ipso facto changed, mandamus would lie to compel the court to transfer the files. The use of mandamus became common in this class of cases and it was clearly an appropriate remedy, though an extraordinary one. It did not at all trench on the judicial authority of the district court or operate to review its judgment.

In the recent case of Winegar v. Martin, 148 Minn. 489, 182 N. W. 513, where it was claimed that a party was joined to evade the statute, it was held that the order changing the place of trial was not appealable. The court there reviews the cases in which mandamus has been used. An examination of them discloses that it is the approved practice to try on mandamus the question whether the place of trial has in fact been changed in cases where a party is entitled to it of right under section 7722, and that it has been used when the court changed or refused to change the venue under section 7723, subd. 1, because a party was joined to evade section 7722. In their anxiety for the determination of the

substantive right neither the parties nor the court thought of the propriety of the use of a writ. The determination of the court in a case like that last cited is judicial. So the determination in this case that the convenience of witnesses and the ends of justice will be promoted is judicial. The use of mandamus in reviewing the order of the trial court, affirming or reversing it, is a perversion of the original scope and purpose of the writ. But a majority of the court are of the opinion that mandamus should be, in all cases involving a change of the place of trial under the statute, an appropriate remedy, and that it has now become a reviewing writ when there is a dispute as to the proper place of trial, and lies to determine the correctness of the judgment of the trial court in granting or denying a motion upon the ground of convenience of witnesses. That in a particular case it assumes a negative character, as a sort of injunctive mandamus, commanding the court to retain the case for trial, is a necessary result of its use as a reviewing writ, for if so used it must sometimes command action and sometimes command nonaction.

Order affirmed.

DIBELL, J. (dissenting).

In my judgment the writ of mandamus should not be perverted to serve the purpose of an appeal and to review the judgment of the district court. That it should be so used was not intended by Const. art. 6, § 2, nor by G. S. 1913, § 8266. The use of the writ now sanctioned gives a fairly convenient way of getting a speedy decision before trial. So would certiorari or prohibition if their use were sanctioned for the same purpose. It might be well if the statute made all orders relative to the change of venue appealable within a short time after made with a provision for a speedy hearing, but it does not, and we have held such orders not appealable, though reviewable on appeal from the judgment, or order on motion for new trial. I think the writ should be quashed upon the ground that mandamus does not lie.

SECURITY STATE BANK OF WALDORF v. E. A. BRECHT AND PETER BRECHT. J. F. DETJEN, GARNISHEE. FARMERS STATE BANK OF PEMBERTON, INTERVENER-APPELLANT.[1]

December 16, 1921.

No. 22,579.

Appeal and error — discharge of garnishee — admitting intervener in garnishment.

An order denying a motion to discharge a garnishee is not appealable, but one denying a motion to vacate an ex parte order making a claimant of the garnished property a party to the proceeding is appealable.

Garnishment — fraud of creditor in obtaining note — inchoate lien of plaintiff.

The garnishee disclosed an indebtedness to one of the defendants. Plaintiff applied for judgment on the disclosure. Subsequently the garnishee filed an affidavit, stating that a bank held his note representing the same indebtedness and running to one of the defendants who had transferred the note to the bank, and further stating that the payee had procured the note by trick and artifice. Upon the plaintiff's application, the bank was made a party and filed a pleading setting out the note. Plaintiff answered that the note had been procured by fraud on the part of the payee. *Held*:

(1) That the bank was properly made a party.

(2) That the plaintiff acquired an inchoate lien by the garnishment, which gave it the right to question the existence and validity of the note.

(3) That the disclosure did not show conclusively that the payment of the debt depended upon a contingency.

Action in the district court for Waseca county to recover $1,500 on a promissory note. The history of the litigation is narrated in the second paragraph of the opinion. The alternative motion of the Farmers

[1]Reported in 185 N. W. 1021.

State Bank of Pemberton to vacate the order making it a party and to dismiss the action as to it, or to discharge the garnishee, was denied, and its alternative motion to change the venue to Blue Earth county was granted, Childress, J. From that part of the order denying its motions, the bank appealed, while plaintiff obtained from this court an alternative writ of mandamus to review the order for the change of venue. Affirmed.

S. B. Wilson, for appellant bank.

Moonan & Moonan, for respondent bank.

LEES, C.

In this action, brought in the district court of Waseca county, a garnishee summons was issued and the garnishee made disclosure in substance as follows:

In June, 1919, the defendant Peter Brecht made a sale of the garnishee's farm to one Kent and was to receive a commission for his services. The garnishee gave Kent a contract for a deed and received a payment of $1,000. The contract called for an additional payment of $5,000 on March 1, 1920. Brecht's commission was $1,400. Asked when the commission was payable, the garnishee answered: "After receiving my second payment of $5,000, March 1, 1920." Plaintiff obtained a default judgment against the defendants and gave notice to the garnishee that upon his disclosure it would apply for judgment against him for $1,400. Before judgment was entered the garnishee was notified by the Farmers State Bank of Pemberton that his note to Peter Brecht for $1,400 was at the bank and fell due March 4, 1920. On June 30, 1920, the garnishee made an affidavit purporting to be supplementary to his disclosure. The substance of his affidavit was that Brecht procured the note by fraud, trick and artifice, and then transferred it to the Pemberton bank, which is threatening to enforce payment, and that the note represented the identical indebtedness to Brecht which the garnishee had disclosed. The affidavit concluded with a statement that it was made to enable plaintiff to have the Pemberton bank brought in to disclose its right, if any, to the money due from him to Brecht. On July 6, 1920, the district judge entered an order making the Pemberton bank a party to the proceeding, and requiring it to file an answer therein within 20 days after the service of the order or be barred of its claim.

On July 8, the order and a notice requiring it to appear were served on the bank. Pursuant to the order, it appeared and filed a pleading, alleging that on June 4, 1919, the garnishee executed to Peter Brecht a note for $1,400, payable nine months after date and that Brecht, before maturity, sold and transferred the note to the bank for a valuable consideration. Plaintiff responded by filing a pleading containing a general denial, accompanied by a specific allegation that Brecht had obtained the note by trick, artifice and deceit, without knowledge on the garnishee's part of the character of the instrument and without an intent to execute a note, and that there was no consideration for the alleged note. The Pemberton bank demurred to this portion of the pleading and also moved to strike it out as sham and frivolous. The court overruled the demurrer and denied the motion to strike. The bank also served notice of an application for the vacation of the order making it a party to the garnishment proceeding, for the discharge of the garnishee, and for a change of venue from Waseca county to Blue Earth county. The change of venue was granted, but in all other respects the application was denied. The Pemberton bank appealed from the order insofar as it denied its application, and the plaintiff obtained from this court an alternative writ of mandamus to review the order for a change of venue.

1. That portion of the order which denied the motion to discharge the garnishee was not appealable, Duxbury v. Shanahan, 84 Minn. 353, 87 N. W. 944, Krafve v. Roy, 98 Minn. 141, 107 N. W. 966, 116 Am. St. 346, but that portion of it which denied the motion to vacate the order making the Pemberton bank a party to the garnishment proceeding was appealable. Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638; National Council K. & L. of S. v. Weisler, 131 Minn. 365, 155 N. W. 396. The bank was made a party by an ex parte order, which was not appealable. State v. District Court F. J. D. 52 Minn. 283, 53 N. W. 1157; West Pub. Co. v. De La Mott, 104 Minn. 174, 116 N. W. 103. As a general rule, neither is an order appealable which grants or denies a motion to vacate a nonappealable order. Brown v. Minn. T. Mnfg. Co. 44 Minn. 322, 46 N. W. 560; Lockwood v. Bock, 46 Minn. 73, 48 N. W. 458; Barrie v. Northern Assur. Co. 99 Minn. 272, 109 N. W. 248. There are exceptions to the rule, however, and this case falls within one of them. A final order affecting a substantial right in a special proceeding is ap-

pealable. If the order in question stands, the bank will be put to the expense of a lawsuit, unless it relinquishes its right of recovery upon the garnishee's note. Its substantial rights are affected and, under the rule stated in Sundberg v. Goar, supra, it was entitled to appeal.

2. On the merits the single question before us is whether the court was justified in retaining the Pemberton bank as a party to the proceeding.

After the bank appeared and served a pleading in response to the order making it a party, there may be some question as to its right to ask for the vacation of the order. A motion to vacate an order should be seasonably made. McLaughlin v. City of Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134, and the trial court might have denied the motion on the ground suggested. But, passing that question, we think the order should be sustained on the merits.

If the bank had or claimed an interest in the garnished property antedating the garnishment, it was properly brought in as a party. Section 7869, G. S. 1913. The garnished property was the indebtedness of the garnishee to Brecht. The bank's note represented the same debt. The point is made that the garnishee is liable on the note and hence garnishment will not lie. To make this objection available the existence of a valid note must be presupposed. If the note is void, the original debt was not merged in it and is still subject to garnishment. The pleadings put in issue the existence and validity of the note. The issue can only be determined by a trial on the merits, to which the parties are entitled as a matter of right. Parke, Davis Co. v. McWhirter, supra, page 234, 185 N. W. 648. It is urged, however, that no one but the garnishee may question the existence and validity of the note. We are not of that opinion. If the garnishee discloses that there is a claimant of the debt he admittedly owes, he has the right to ask that the claimant be made a party. This is necessary for his own protection. Rood, Garnishment, § 336; Levy v. Miller, 38 Minn. 526, 38 N. W. 700, 8 Am. St. 691. The garnishee did not know of the existence of the note when he made disclosure, but called attention to it by his affidavit subsequently filed. The practice may have been irregular, Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. 139, but the affidavit seems to have been treated as a supplementary disclosure.

The garnishee is vitally interested in having his liability determined. On the one hand, plaintiff seeks to charge him as garnishee. On the other, the Pemberton bank seeks to hold him on his note. He is in danger of being required to pay his debt twice. Plaintiff is also interested and should be allowed to litigate the question of the validity of the note. By the service of the garnishee summons it acquired an inchoate lien upon the debt. Marsh v. Wilson Bros. 124 Minn. 254, 144 N. W. 959. The note is merely the evidence of the debt. It is necessary to investigate its character to determine the validity of the Pemberton bank's claim against the garnishee, and we think plaintiff acquired the right to question the note by attaching the debt. North Star B. & S. Co. v. Ladd, 32 Minn. 381, 20 N. W. 334; Coykendall v. Ladd, 32 Minn. 529, 21 N. W. 733. Citing Bacon v. Felthous, 103 Minn. 387, 115 N. W. 205, the point is made that plaintiff acquired no greater rights by garnishment than were had by Brecht himself. If limited to plaintiff's rights as to the garnishee, this is correct, but not so when plaintiff's rights so acquired are asserted against the Pemberton bank. North Star B. & S. Co. v. Ladd, supra. It is urged that the garnishee will not be damaged if he pays the note, even if it was procured by fraud. He concedes an indebtedness of $1,400, which both banks are seeking to collect from him. He cannot pay one without the hazard of having to pay the other also. The court should determine which of the two has the better right, to protect him from possible double liability.

It is contended that nothing was certainly owing by the garnishee when the summons was served upon him, and, therefore, he should be discharged. As already noted, we cannot review an order refusing to discharge a garnishee. However, both parties have argued the question and we will briefly consider it. A debt is subject to garnishment before it has become payable, if its payment does not depend upon any contingency. Section 7863, G. S. 1913. The contingency asserted here is that nothing would be due from the garnishee, unless Kent paid $5,000 on March 1. We are unable to take that view of the garnishee's testimony. As we read it, Brecht had earned his commission, but it was not payable until the second instalment of the purchase price of the farm fell due.

It is our conclusion that the Pemberton bank was properly retained as a party to the proceeding, and the order from which it appeals is therefore affirmed.

JOE COHEN v. NORTH AMERICAN LIFE & CASUALTY COMPANY.[1]

December 16, 1921.

No. 22,609.

Health insurance — construction of policy — origin of disease.

A policy of health insurance giving indemnity for disability resulting from a "disease which shall originate and begin after this policy shall have been in continuous force for thirty days" covers a disease first manifesting itself after such time, although the medical cause antedated it.

Action in the municipal court of Minneapolis to recover $167.50 on defendant's policy. The case was tried before Charles L. Smith, J., who made findings and ordered judgment in favor of plaintiff. From an order denying its motion for a new trial, defendant appealed. Affirmed.

Alvord C. Egelston, for appellant.

John R. Coan, for respondent.

DIBELL, J.

Action on a policy of insurance. There were findings for the plaintiff and the defendant appeals from the order denying its motion for a new trial.

The defendant issued to the plaintiff a combined accident and health policy. We are concerned only with the health feature of it. The policy insured the defendant "against disability caused solely by disease." It promised indemnity for a disability coming "solely as the result of disease which shall originate and begin after this policy shall have been in continuous force for thirty days."

[1]Reported in 185 N. W. 939.

The policy was issued on the fifteenth of November, 1919. On December 19, 1919, the plaintiff became ill and called a physician. On December 25, 1919, he went to the hospital. On December 28 an operation was performed. One of the surgeons assisting at the operation gave the cause as "post operative adhesions," and said that the plaintiff was also afflicted with "cholecystitis." The plaintiff made the ordinary recovery. Six years before he had had an operation for appendicitis. Thereafter he was well. Until his attack of December 19 he had not been sick. There was medical testimony that would justify, if not require, a finding that the trouble came at least in part from post operative adhesions existing prior to the policy.

The rule of construction is the usual one. It must be favorable to the insured. The insurer intended to give and the insured expected to get indemnity if illness or sickness came after the policy had been in force for thirty days. They were not concerned with the latent or the remote cause of it. The cause of the disease insured against is not mentioned in the policy as a condition of liability. The time when the disease shall "originate and begin" is made important. The parties had in mind, as the subject of indemnity, disability from illness or sickness or disease first manifesting itself or becoming active after the thirty day period. For this the policy promised indemnity. It did not exempt the company from liability because the medical cause of the disease causing disability antedated the expiration of the period. A construction making the time of the medical cause of the outbreak of the disease determinative of liability, irrespective of actual illness, sickness or disease, as commonly understood, would make health insurance subject to uncertainty, unattractive to those wanting reasonable health insurance protection, and less marketable. The policy issued by the defendant is fair to the insurer and the insured. As we construe it the defendant is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So the ordinary man wanting health protection would understand it.

In a note L. R. A. 1918B, 646, cases involving a limitation similar to that in the case before us are collected, but none having a direct bearing upon the facts involved here is cited.

Order affirmed.

HARRY ANDERSON v. MINNEAPOLIS STREET RAILWAY COMPANY.[1]

December 16, 1921.

No. 22,610.

New trial — contributory negligence of automobile driver — wilful negligence of defendant.

Action to recover for damages to plaintiff's automobile caused by collision with the defendant company's street car. The trial court directed a verdict for defendants and thereafter granted a new trial. *Held*:

(1) That the evidence shows conclusively that plaintiff was guilty of contributory negligence.

(2) That there was not evidence sufficient to warrant the submission of the question of wilful negligence to the jury, that the order directing a verdict for the defendants was right and that plaintiff was not entitled to a new trial.

Action in the municipal court of Minneapolis to recover $140 for injuries to an automobile. The case was tried before Charles L. Smith, J., who when plaintiff rested granted defendants' motion for a directed verdict on the ground that plaintiff had proved himself guilty of contributory negligence; that he had failed to prove his cause of action against defendant and that the evidence was not sufficient to warrant a verdict for plaintiff. From an order granting plaintiff's motion for a new trial, defendants appealed. Reversed.

John F. Dulebohn, W. D. Dwyer and *Ralph T. Boardman,* for appellants.

Marshall S. Snyder, for respondent.

QUINN, J.

Plaintiff brings this action to recover for damage to his automobile caused by a collision with the defendant company's street car, through the alleged negligence of defendants. At the close of plaintiff's testimony the court directed a verdict in favor of the defendants and from an order granting a new trial upon the ground that the evidence made a case of wilful negligence for the jury, defendants appeal.

[1]Reported in 185 N. W. 661.

The Minneapolis Street Railway Company is a corporation operating a street railway system in the city of Minneapolis. J. D. Lane was the motorman on the car in question. The damage occurred at the intersection of First Avenue North and Seventh street. Upon each of these thoroughfares are double street railway tracks which are connected at this intersection by a wye. On May 13, 1920, a street car in charge of Lane was standing on the track near the intersection. It proceeded over the curve leading from Seventh street to First Avenue North. Plaintiff's automobile came up behind the car which had stopped. When the car started again the automobile was passing at its side. The left side of the automobile came into contact with the right side of the street car back of the motorman's cab door. The right front wheel of the automobile was against the curb to the right of the track upon which the street car was moving. At this point it is 8 feet from the curb to the rail of the track. The street car was moving on a curve to the right, so that the body of the car was necessarily considerably closer to the curb than the rail. It is the contention on behalf of the plaintiff that the damage to his automobile was caused by the wilful and wanton negligence of the defendants. The cause was tried on behalf of the plaintiff on that theory. It is so alleged in the complaint. The answer denies negligence and affirmatively alleges plaintiff's contributory negligence. The reply denies contributory negligence. The issues of fact are failure of defendants to signal that the car was moving and the alleged wilful neglect to avoid the accident when they discovered plaintiff in a position of peril.

Plaintiff testified that he was familiar with the street crossing, had driven over it before; that he knew there were several tracks at that point and that the street cars went over the curve in question at times; that his automobile was 5½ feet wide; that he was some 15 feet from the point of contact when he observed the street car moving; that he was going at the rate of about 2 or 3 miles per hour, had full control of his car, and could have stopped it within 2 or 3 feet. Had he done so the collision would have been avoided. His failure to do so was negligence on his part which contributed to the accident. Under these circumstances it was immaterial whether the defendant failed to give a signal of the movement of the car. Medcalf v. St. Paul City Ry. Co. 82 Minn.

18, 84 N. W. 633; Teal v. St. Paul City Ry. Co. 96 Minn. 379, 104 N. W. 945; Schrankel v. Minneapolis St. Ry. Co. 144 Minn. 465, 466, 174 N. W. 820; 2 Dunnell, Minn. Dig. § 7036, and cases cited; Kaiser v. Minneapolis St. Ry. Co. 147 Minn. 278, 181 N. W. 569.

The decisive question in the case then is whether there was proof sufficient to warrant the submission of the question of wilful negligence to the jury. Under the decisions of this court wilful negligence is said to be conduct that amounts to a "reckless disregard of the safety of the person or property of another by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury." Gallagher v. Northern Pacific Ry. Co. 94 Minn. 64, 101 N. W. 942; Teal v. St. Paul City Ry. Co. supra; Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co. 103 Minn. 224, 114 N. W. 1123, 14 L.R.A.(N.S.) 886; Havel v. Minneapolis & St. L. R. Co. 120 Minn. 195, 139 N. W. 137. The automobile came into contact with the side of the street car back of the motorman operating it. In this position he could not see the automobile, unless through the mirror referred to in the testimony, or by turning and looking back. The motorman was called by the plaintiff as a witness for cross-examination. He testified in effect that while operating the car on this curve he looked a number of times into the mirror to see whether there was anything approaching from the rear and saw nothing; that the first he knew of the plaintiff's presence was when he felt a jar from the impact, at which time a signal to stop was given by the conductor.

As to how the collision occurred, plaintiff testified that as he approached the intersection, when he was 25 or 30 feet behind the street car, he saw it standing on the switch ready to go; that it started and he slackened his speed; that the street car stopped again; that he then started his automobile, and, when about even with the middle of the street car, he saw he could not get through and immediately drove up against the curb; that he had plenty of time to hollo to the motorman to stop, but he thought he might stop or look out through the glass, and that the street car then crowded against his automobile crushing it.

We discover nothing in the record to controvert the testimony of the motorman that the first he knew of the presence of the plaintiff or his car was when he felt the jar from the impact. Nor does counsel for plaintiff in his brief point out any testimony bearing upon that phase of

the case, but rather recurs to the contention that under the proofs it does not conclusively appear that plaintiff was guilty of contributory negligence. We are unable to concur in this contention. It is clear that, as the appellant's automobile neared the corner, the distance between the rail and the curb lessened to such a degree that immediately in front of the street car at the time of the collision that distance was only 4 feet 8 inches, and it would be impossible for the automobile to pass between the moving street car and curb at that point, clearly indicating that the plaintiff was driving into certain danger. There was nothing to obstruct his view. He had full control of his automobile with full knowledge of the situation. It follows that the order directing a verdict for the defendants was right and that plaintiff was not entitled to a new trial.

Reversed.

STATE EX REL. EDWARD H. BEISE AND LEONARD L. BEISE v. THE DISTRICT COURT OF BLUE EARTH COUNTY, MINNESOTA, AND HON. W. L. COMSTOCK, JUDGE THEREOF.[1]

December 16, 1921.

No. 22,674.

Mandamus to retain local action from change of venue — peremptory writ.

On the facts stated in the opinion the action is *held* to involve the title to real property situated in Blue Earth county and to be triable in that county.

Upon the relation of Edward H. Beise and Leonard L. Beise, the supreme court granted its alternative writ of mandamus directed to the district court for Blue Earth county and the Honorable W. L. Comstock, judge thereof, to retain the action mentioned in the opinion for trial in that county. Peremptory writ granted.

C. J. Laurisch, S. B. Wilson and *H. A. Johnson,* for relators.

Moonan & Moonan, for respondents.

[1]Reported in 185 N. W. 953.

PER CURIAM.

This is a procedure to secure, upon the petition of Edward H. and Leonard L. Beise, father and son, a writ of mandamus, directing the district court of Blue Earth county to retain the action hereinafter referred to for trial in that county.

On December 6, 1920, the relator, Edward H. Beise, brought an action in the district court of Blue Earth county against Burt I. Weld, Maud R. Weld, Peter C. Sorenson, Marcia Sorenson and Leonard L. Beise, to determine adverse claims to 608 acres of land in Blue Earth county, under section 8060, G. S. 1913. Plaintiff resides in Blue Earth, defendant Beise in Hennepin and the other defendants in Murray county, this state. The defendants residing in Murray county took the usual steps to have the venue changed to that county where a majority of the defendants reside, under section 7715, G. S. 1913. The court granted the change, but the files have not been transmitted.

The complaint is in the usual form to determine adverse claims to real estate. The Murray county defendants answered, alleging ownership and title to the land in the defendants Burt I. Weld and Peter C. Sorenson, under a warranty deed, and denying the allegations of the complaint. The defendant Beise answered separately, alleging that he is the owner of an undivided one-half interest in said land under a warranty deed. The plaintiff replied to the answer of the Murray county defendants, setting forth various transactions of fraud, bad faith, conspiracy, etc., on the part of Weld and Sorenson in procuring the deed under which they claim title, denying the allegations of their answer, and demanding judgment as prayed for in his complaint. The allegations of the reply are the same as those in the complaint in a former action between the same parties before this court and reported in 146 Minn. 422, 178 N. W. 1004.

The question is whether the subject of the action is local, as distinguished from those partly local and partly transitory. That is, if the subject matter of the action is situated in a county other than one in which the parties reside and the primary and principal relief sought relates to such subject matter, then the action is local and must be brought and tried in the county where such subject matter is situated. State v. District Court of Clay County, 120 Minn. 99, 139 N. W. 135;

State v. District Court of Pine County, 94 Minn. 370, 102 N. W. 869, 3 Ann. Cas. 725.

Section 7715, G. S. 1913, provides that: "Actions for the recovery of real estate, the foreclosure of a mortgage or other lien thereon, the partition thereof, the determination in any form of an estate or interest therein, * * * shall be tried in the county where such real estate or some part thereof is situated * * *." Under this statute, where real estate is the subject matter of an action and the principal relief sought relates to the title thereto, the action must be brought and tried in the county where the property is situated. Kommer v. Harrington, 83 Minn. 114, 85 N. W. 939; Hjelm v. City of St. Cloud, 129 Minn. 240, 152 N. W. 408; State v. District Court of Big Stone County, 120 Minn. 526, 139 N. W. 613; Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41; Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523.

Actions of this class are brought to compel the defendants to tender issues, unless they choose to abandon their claims. Walton v. Perkins, 28 Minn. 413, 10 N. W. 424. The defendants answered, asserting title in themselves, thereby raising a direct issue as to the title to the land. No other issue is raised by the pleadings. In his reply plaintiff alleges certain matters bearing upon the character and source of Weld and Sorenson's alleged title, explanatory of how they procured the same and as bearing upon its validity, and demands judgment as prayed for in the complaint. No other relief or kind of judgment is asked for in any of the pleadings, nor do we understand how any other could be had. When the former action between the parties was being considered, an entirely different situation was presented. There the allegations of the complaint alone were being considered and it was held that it stated a cause of action upon contract which was transitory. In the case now under consideration the reply must be considered and construed in connection with the other pleadings, in order to determine the real issue. When so considered it is clear that the issues involve the title to the land only. The relief asked relates to nothing but the real estate described in the complaint. The issue and nature of the action cannot be determined from affidavits of an adverse litigant.

Let a peremptory writ issue as prayed.

A. D. KLEINMAN v. THE BANNER LAUNDRY COMPANY AND THE FIDELITY & CASUALTY COMPANY.[1]

December 23, 1921.

No. 22,006.

Explosion of steam boiler — res ipsa loquitur.

1. The defendant laundry company owned and operated a steam boiler on the premises of the plaintiff of which premises it was the lessee. It had exclusive control of the operation and management of the boiler. The boiler exploded and damaged the plaintiff's property. In an action by the plaintiff to recover damages of the laundry company, it is *held* that the res ipsa loquitur doctrine applies.

Specific allegations of negligence do not affect application of doctrine.

2. The complaint alleges the ultimate fact of negligence in the laundry company in the care, management and operation of the boiler and in its defective condition. It further alleged specific acts of negligence. It is *held* that the allegation of specific acts of negligence did not prevent the application of the res ipsa loquitur doctrine.

Absence of fusible plug — refusal to submit question to jury not error.

3. The boiler did not have a fusible plug in the crown sheet. The water was some 16 inches above the cast iron plug that was used. Conceding that the statute requires a fusible plug, the failure to provide it had no causal connection with the explosion. The refusal of the court to submit the absence of such plug as a ground of negligence was correct.

Res ipsa loquitur not applicable to insuring casualty company.

4. The defendant casualty company did not have charge of the operation of the boiler. It inspected the boiler, and insured the owner. It fixed the resisting power at 110 pounds. When the boiler exploded it was carrying a greater load. It is *held* that the res ipsa loquitur doctrine did not apply to the casualty company and that the verdict in its favor is sustained.

[1]Reported in 186 N. W. 123.

Action in the district court for Ramsey county to recover $60,000 damages. The case was tried before Olin B. Lewis, J., who when plaintiff rested denied separate motions to dismiss the action as to each defendant, and at the close of the testimony denied the motion of defendant casualty company for a directed verdict, and a jury which returned a verdict in favor of defendants. From an order denying his motion for a new trial, plaintiff appealed. Affirmed as to the casualty company; reversed as to the laundry company.

C. J. Cahaley and *Walter C. Brandt,* for appellant.

O. E. Holman and *Briggs, Weyl & Briggs,* for respondents.

DIBELL, J.

Action by the plaintiff to recover damages to his property caused by the explosion of a boiler. There was a verdict for the defendants. The plaintiff appeals from the order denying his motion for a new trial.

The plaintiff was the owner of improved real property in St. Paul. The defendant laundry company was the lessee. It conducted a steam laundry therein and owned and used in connection therewith a large tubular steam boiler. The defendant casualty company was the insurer of the laundry company against damage caused by the explosion of the boiler.

1. On July 22, 1919, a few minutes after the plant closed at the end of the day's work, the boiler exploded and damaged the plaintiff's building. The principal question is whether the doctrine phrased in the maxim res ipsa loquitur applied and whether the jury could consider it in determining the liability of either one or both of the defendants. The trial court held that it did not apply and did not present it to the jury. The charge negatived its application.

In the case of Banner Laundry Co. v. Great Eastern Casualty Co. 148 Minn. 29, 180 N. W. 997, involving the same explosion, it was correctly suggested that by the weight of authority the res ipsa loquitur doctrine was without application to an explosion of a steam boiler, but a decision was unnecessary to a determination of the case, the evidence being deemed to show that there was no negligence of the plain-

tiff suing the insurance company, and the question was left open. It was held that the explosion was due to the sticking of the safety valve and that the sticking was from some unknown cause or was so unusual that negligence could not be predicated upon it. In this case it does not conclusively appear that the explosion was from a cause for which the defendant was not liable in negligence. The evidence is not the same. For example, there is evidence in this case that a patch or half sheet put on after the boiler had been used for some years very materially weakened its strength. The evidence is not of such character that the res ipsa doctrine, if applicable, can be ignored upon the ground that the proof shows conclusively that the explosion came from a non-negligible cause.

The authorities relative to the application of res ipsa loquitur to boiler explosions are collected in 20 R. C. L. 192; 113 Am. St. 1015; Ann. Cas. 1912A, 976; 15 L.R.A. 38; L.R.A. 1917E, 186. We have held that doctrine applicable where cars ran down a grade and collided with a tender, Olson v. Great North. Ry. Co. 68 Minn. 155, 71 N. W. 5; where an awning fell, Waller v. Ross, 100 Minn. 7, 110 N. W. 252, 12 L.R.A.(N.S.) 721, 117 Am. St. 661, 10 Ann. Cas. 715; where the air hose on a moving train burst, Rose v. Minneapolis, St. P. & Sault Ste. M. Ry. Co. 121 Minn. 363, 141 N. W. 487, Ann. Cas. 1914D, 92; where the drawbar of a car pulled out, Wiles v. Great Northern Ry. Co. 125 Minn. 348, 147 N. W. 427; where a leak of gas from underground mains did damage, Gould v. Winona Gas Co. 100 Minn. 258, 111 N. W. 254, 10 L.R.A.(N.S.) 889; where burns were caused by the taking of an X-ray, Jones v. Tri-State Tel. & Tel. Co. 118 Minn. 217, 136 N. W. 741, 40 L.R.A.(N.S.) 485; Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073, Ann. Cas. 1918E, 256; and where there was a breaking of a dam, Barnard v. City of Fergus Falls, 115 Minn. 506, 132 N. W. 998; City Water Power Co. v. City of Fergus Falls, 113 Minn. 33, 128 N. W. 817, 32 L.R.A.(N.S.) 59, Ann. Cas. 1912A, 108.

The defendant laundry company owned the boiler and had exclusive charge of its management and operation. Boilers sometimes explode. Comparing the number of explosions with the extent of the use of

boilers, explosions are not frequent. If they are kept in proper condition and repair, and if they are operated properly, explosions are unusual. Whether the res ipsa doctrine, which permits an inference of negligence from the fact of an explosion, should apply is largely a question of how justice in such cases is most practically and fairly administered. There is nothing legally illogical in permitting the inference to be drawn. Usually the party injured is without information upon which he may with certainty allege the exact cause, and is without direct proof. Perhaps the exact cause is incapable of ascertainment. The actual proof, if any, is with the party having the management of the instrumentality. These are practical considerations. We think the jury should have been permitted to draw an inference of negligence of the laundry company from the occurrence of the explosion. Though the holding may put us with the minority, we are content with it.

It is not necessary to discuss particularly the effect as proof of the application of the res ipsa maxim. Our holdings are not that it puts the ultimate risk of nonpersuasion upon the defendant. While an occasional expression may be found indicating such view, our holdings are that the application of the rule does not shift the ultimate burden of negativing negligence before the jury upon the defendant, but, in the ordinary case, and without saying that a particular case may not compel the direction of a verdict one way or the other, permits the jury to draw an inference of negligence from the result. Keithley v. Hettinger, 133 Minn. 36, 157 N. W. 897, Ann. Cas. 1918D, 376; Holt v. Ten Broeck, 134 Minn. 458, 159 N. W. 1073, Ann. Cas. 1918E, 256. In both of these cases reference is made to Sweeney v. Erving, 228 U. S. 233, 240, 33 Sup. Ct. 416, 57 L. ed. 815, Ann. Cas. 1914D, 905, where Justice Pitney says that the meaning of res ipsa loquitur is "that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the

defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."

It may be noted that in some cases involving bailments we have held advisedly, and largely induced by practical considerations, that in the event of loss or destruction the burden is upon the bailee of showing to the jury freedom from negligence. Steenson v. Flour City F. & T. Co. 144 Minn. 375, 175 N. W. 681, and cases cited. The relation of the res ipsa doctrine to the burden of proof is considered in the notes in 16 L.R.A.(N.S.) 527; L.R.A. 1916A, 930.

2. The defendant urges that, since the complaint alleges specific acts of negligence, the plaintiff cannot recover by the application of res ipsa loquitur. There are cases so holding. We do not follow them.

The complaint alleges specific acts of negligence. It alleges also that at the time of the explosion the laundry company was in the exclusive possession, control and management of the boiler and that it so negligently operated, managed and controlled it that it exploded and partially wrecked the building; and it alleges generally and specifically that the boiler was defective and unfit for use. The pleading of negligence in general terms was sufficient within the rule stated in City Water Power Co. v. City of Fergus Falls, 113 Minn. 33, 128 N. W. 817, 32 L.R.A.(N.S.) 59, Ann. Cas. 1912A, 108, to permit reliance upon the res ipsa doctrine. The ultimate fact of negligence is alleged. By the weight of authority the plaintiff is not denied the application of the res ipsa rule, though he alleges specific acts of negligence, and fails of proof, if he alleges negligence in general terms in the operation, maintenance and care of the instrumentality under the exclusive control and management of the defendant doing the mischief. Cleary v. Cavanaugh, 219 Mass. 281, 106 N. E. 998; James v. Boston Elev. Ry. Co. 204 Mass. 158, 90 N. E. 513; Cassady v. Old Colony St. Ry. Co. 184 Mass. 156, 68 N. E. 10, 63 L.R.A. 285; Walters v. Seattle R. & S. Ry. Co. 48 Wash. 233, 93 Pac. 419, 24 L.R.A.(N.S.) 788; Kluska v. Yoemans, 54 Wash. 465, 103 Pac. 819, 132 Am. St. 1121; Biddle v. Riley, 118 Ark. 206, 176 S. W. 134, L.R.A. 1915F, 922; Dearden v. San Pedro, L. A. & S. L. R. Co. 33 Utah, 147, 93 Pac. 271; Wash-

ington-Virginia Ry. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E, 546; Louisville & S. I. T. Co. v. Worrell, 44 Ind. App. 480, 86 N. E. 78; Roberts v. Sierra Ry. Co. 14 Cal. App. 180, 111 Pac. 519, 527. The cases are not in harmony. Variation of language in the statement of the rule is sometimes confusing, and the engrafting of distinctions upon one rule or the other does not always induce clearness. The cases are collated and discussed in 24 L.R.A.(N.S.) 788, and L.R.A. 1915F, 992. The weight of authority accords with our holding that the complaint permits the application of the res ipsa doctrine and our holding is in consonance with our expressed view that a pleading is a means to an end and that end the trial on all the merits.

3. There is a claim of negligence because of the failure of the laundry company to have a fusible plug in the crown sheet. The court refused to submit such failure as a ground of negligence. It may be conceded, without holding, that the requirement of G. S. 1913, § 4748, as amended, applies to a boiler insured and certified as this one was, and required a fusible plug. We have not gone through the statute. In any event there was no causal connection between the absence of the prescribed plug and the explosion. It is conceded that the water covered the plug by so much as 16 inches. The absence of the kind of a plug specified by the statute had no causal connection with the explosion.

4. The defendant casualty company did not have charge of the operation of the boiler. Charge of operation is an essential to the application of the res ipsa doctrine. Lehman v. Dwyer P. & H. Co. 104 Minn. 190, 116 N. W. 352; McGillivray v. Great North. Ry. Co. 138 Minn. 278, 164 N. W. 922. It inspected the boiler and insured the laundry company. It passed the boiler as fit to carry a load of 110 pounds. It did not accord to it a higher resisting power. It is found by the jury that when the explosion occurred it was carrying a greater load. Apparently it was carrying a much greater pressure. The res ipsa loquitur rule did not apply to the casualty company. Whatever ground of action, if any, the plaintiff had against the casualty com-

pany, and we do not stop to question or discuss it, no error inheres in the verdict in favor of the company. The casualty company has an insurance contract with the laundry company. What the rights of the parties to it are if the laundry company is compelled to pay damages because of the explosion, is not of present interest.

Counsel for the plaintiff urges other errors in the charge. We have examined them and find none calling for comment. The charge was fair throughout. The suggestion of counsel that there was unfairness to the plaintiff is quite groundless and is unjust. The charge was fair and thorough without a suggestion of favoritism.

The order denying the plaintiff's motion for a new trial is affirmed as to the casualty company and reversed as to the laundry company.

FRED KATZENMEIER v. JOHN DOEREN.[1]

December 23, 1921.

No. 22,368.

Workmen's Compensation Act — when judgment is not a bar to action.

1. A judgment in favor of a defendant in a workmen's compensation proceeding cannot be pleaded in bar to an action predicated on the alleged negligence of defendant which was not a material issue in the former.

When judgment does not create an estoppel.

2. Neither could the judgment be pleaded as an estoppel, because none of the findings on which it was rendered determined the questions of defendant's negligence or plaintiff's contributory negligence.

Action in the district court for Ramsey county to recover $10,000 for injuries received in falling upon an icy sidewalk. From an order, Dickson, J., sustaining plaintiff's demurrer to the third defense set forth

[1]Reported in 185 N. W. 933.

in the answer on the ground that upon its face the defense did not state facts sufficient to constitute a defense, defendant appealed. Affirmed.

Moore, Oppenheimer, Peterson & Dickson, for appellant.

Emil W. Helmes, for respondent.

HOLT, J.

From an order sustaining a demurrer to a defense made in the answer, defendant appeals.

The action is to recover damages for an injury claimed to have been sustained on February 2, 1914, when plaintiff fell on a cement walk leading from a public street into defendant's factory in St. Paul, where plaintiff was employed. It is alleged that defendant carelessly and negligently permitted the walk to become covered by large and dangerous formations of ice upon which plaintiff slipped. There is also an allegation that when plaintiff slipped and fell he walked upon defendant's premises as part of his services for him.

The defense in the answer, to which the demurrer was sustained, is, in effect, that plaintiff, in July, 1914, commenced an action in the district court of Ramsey county to recover compensation for the same injury now in suit, and that defendant therein answered that the injury was not caused by an accident arising out of and in the course of plaintiff's employment with defendant, which said action was tried and the court made findings of fact and ordered judgment. The findings are set out in full, and it is alleged that pursuant thereto judgment was entered that plaintiff take nothing. The defendant pleads the judgment as a bar and as an estoppel.

It is plain that the judgment was rendered in a compensation proceeding. Where the parties in an ordinary action for damages are within the Workmen's Compensation Act, and, upon the trial, facts are found which show that plaintiff is not entitled to damages, but is clearly entitled to compensation from a defendant employer, the court may give that relief. Such was the case of Mahowald v. Thompson-Starrett Co. 134 Minn. 113, 158 N. W. 913, 159 N. W. 565. But the reverse does not hold true. Negligence is the foundation for a recovery in the

ordinary action for damages. It is of no consequence in a workmen's compensation proceeding. In the latter there are matters which become decisive for or against a recovery, but which may not be of much significance in the ordinary personal injury action. This finding in the former proceeding was decisive against plaintiff therein: "That on the morning of February 2, 1914, and at the time of the fall, plaintiff had not performed any services or work for defendant, nor had his services as such workman or employe begun." The finding has no bearing on the question of defendant's alleged negligence in this action.

The ultimate fact of negligence, upon which a recovery in this action must rest, being not at all important in the compensation proceeding, it is clear that the judgment in the latter can be neither res judicata nor a bar here. West v. Hennessey, 58 Minn. 133, 59 N. W. 984; Woodman v. Blue Grass Land Co. 98 Minn. 87, 107 N. W. 1052; State v. District Court of Wilkin County, 136 Minn. 151, 161 N. W. 388, 13 A.L.R. 1097. In the last cited case the subject is fully discussed and it is held that a judgment in a negligence action is not a bar to the maintenance of a workmen's compensation proceeding for the same injury.

Nor is any finding pleaded available as an estoppel in this action. The only finding at all hinted at an issue of negligence is one to the effect that, when plaintiff fell, a servant of defendant was clearing the snow from the walk, but had not reached the point where plaintiff fell. This, as well as the findings that plaintiff did not prove that he fell on the ice, that he did not prove that he did not fall because of his physical infirmities, and that he did not prove that he did not fall because of the general conditions due to the snowfall, clearly do not create an estoppel here.

The court did not err in sustaining the demurrer.

The order is affirmed.

IN THE MATTER OF THE PETITION OF JOHN J. JOHNSON, SIVER ERICKSON AND OTHERS.[1]

August 10, 1921.

No. 22,535.

Appeal and error — appeal dismissed.

On appeal from an order dismissing a writ to review the action of a county board in designating a certain highway as a state road and the action of the state commissioner of highways in consenting thereto, the only question presented was whether the board acted wisely and the commissioner acted wisely. *Held*: These questions are not judicial but purely legislative and are not reviewable by the court on certiorari. For that reason the appeal was dismissed. [Reporter.]

Upon the relation of John G. Johnson and others the district court for Lyon county granted its writ of certiorari directed to the county board of that county to review the action of the board in designating a certain highway in that county as a state road and an order of the state commissioner of highways in consenting thereto. From an order dismissing the writ, Olson, J., relators appealed. The motion of the county of Lyon to dismiss the appeal was granted.

Charles L. DeRew, for relators.

Rolland Mathews, County Attorney, for respondent.

PER CURIAM.

The trial court issued a writ of certiorari to review the action of the county board of Lyon county in designating a certain highway in said county as a state road and also to review the order of the state commissioner of highways consenting to such designation. On the return the court discharged and dismissed the writ. The relators appeal. Respondents move to dismiss the appeal. The case is to be determined on the record made by the officers whose action is sought to be reviewed. State v. City of Duluth, 125 Minn. 425, 147 N. W. 820. On the record we see no question presented except the question whether the county board acted wisely in designating the road in question a state road and whether the commissioner of highways acted wisely in consenting to such designation. These questions are not judicial but purely legislative and are not reviewable by the court on certiorari.

See Sinclair v. Board of County Commissioners of Winona County, 23

[1]Reported in 184 N. W. 214.

Minn. 404, 23 Am. Rep. 694; Christlieb v. County of Hennepin, 41 Minn. 142, 42 N. W. 930; State v. Clough, 64 Minn. 378, 67 N. W. 202.

The appeal is therefore manifestly without merit and on that ground should be dismissed.

See Johnson v. St. Paul City Ry. Co. 68 Minn. 408, 71 N. W. 619; Kennedy v. Fidelity & Casualty Co. 100 Minn. 144, 110 N. W. 624.

Appeal dismissed.

IN THE MATTER OF COMPENSATION FOR INJURIES TO CLAIRE BREUNING v. CENTRAL WAREHOUSE LUMBER COMPANY.[1]

September 15, 1921.

No. 22,255.

Workmen's Compensation Act — review.

Certiorari is the remedy for the review of proceedings in compensation cases.

In the matter of compensation for injuries to Claire Breuning, John P. Gardiner, commissioner of labor and industries, acting in behalf of Claire Breuning, petitioned the district court for Ramsey county for an order directing the Central Warehouse Lumber Company to show cause why the settlement between the parties made on August 31, 1920, should not be reopened and the employer be required to pay the further sum of $378.90. From an order setting aside the order approving a settlement, Hanft, J., the Central Warehouse Lumber Company appealed. Dismissed.

Stevens & Stevens, for appellant.

K. G. McManigal, for respondent.

PER CURIAM.

This is an appeal from an order vacating an order approving a settlement in a compensation case.

Certiorari is the remedy for the review of proceedings in compensation cases. G. S. 1913, § 8225.

Appeal dismissed.

[1]Reported in 184 N. W. 273.

RICHARD A. D. LEE v. ELLEN MELLEM LEE.[1]

November 4, 1921.

No. 22,433.

Divorce — action to collect payment specified in decree.

A decree of divorce required defendant to pay $1,500 for her husband's undivided one-half interest in a house and certain lots. Defendant neglected to pay the money and this action was brought to collect it. The court directed plaintiff to deposit his deed with the clerk of court and defendant to pay the sum named to the clerk of court for the use of plaintiff, on condition that if she did not do so before a specified day she should be forever barred of her right to purchase his interest in the property for that sum. *Held*: There was no error in receiving the judgment roll in the divorce action or the written tender of a deed from plaintiff, and no error in canceling the privilege to purchase upon failure to make the required payment. [Reporter.]

Action in the district court for Ramsey county to recover $1,500 under a decree of divorce and for a sale of certain premises to pay the same. The case was tried before Dickson, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Jesse E. Greenman, for appellant.

Herbert P. Keller, for respondent.

PER CURIAM.

In a divorce decree the plaintiff herein was granted a divorce, and the defendant's title to her share, which was an undivided half interest in certain lots was confirmed. The decree also provided that the plaintiff convey to the defendant his interest in said lots "together with the dwelling house situated upon the same, upon payment by defendant to plaintiff of the sum of fifteen hundred ($1,500.00) dollars, and that defendant have no other or further right, title or interest in or to the property or earnings of plaintiff, present and future." Defendant neglected to pay the $1,500, and, after waiting several months, plaintiff brought this action to compel a performance of the decree by defendant and for other relief. She appeals from the judgment.

There obviously was no error in the admission of the judgment roll in the

[1]Reported in 184 N. W. 954.

divorce action, nor in receiving the written tender of the deed and the deed from plaintiff to defendant of his share in the premises. The only other assignment of error is that part of the findings and judgment "directing the defendant to pay to the clerk of court for the use of plaintiff said sum of Fifteen Hundred Dollars ($1,500) on or before April 1st, 1921, and decreeing that if she fail to pay said sum on or before said day she shall be forever barred and foreclosed of all her right under and pursuant to said decree of divorce to purchase the plaintiff's interest in said property for said sum." The divorce decree gave defendant the privilege to purchase plaintiff's share of the real estate mentioned for a specified sum. It did not fix the time for so doing, hence the payment was to be made and the deed delivered immediately, or, at any rate, within a reasonable time. Defendant neglected to perform, and there seems to be no valid reason why the privilege given by the divorce decree should not be canceled for such failure. The court did no more. The status of the property as to being occupied as a home by defendant has nothing to do with the question of the court withdrawing a privilege granted in the divorce decree when defendant refuses to comply with the condition annexed to the privilege. There is no error in the judgment of which defendant can justly complain.

The judgment is affirmed.

JOHN A. BLANKENBURG v. MINNEAPOLIS STEEL & MACHINERY COMPANY.[1]

September 23, 1921.

No. 22,418.

Dismissal of action — judgment upon pleadings.

An attempted dismissal of an action by plaintiff was set aside and judgment ordered for defendant for its costs and disbursements. Plaintiff appealed. *Held*: Defendant was not entitled to judgment on the pleadings, because of an issue of fact as to whether an injury sustained by plaintiff came under the Workmen's Compensation Act, and hence the regularity of the dismissal was immaterial. [Reporter.]

Action in the district court for Hennepin county to recover $22,650 for

[1]Reported in 184 N. W. 368.

X-ray injuries. Defendant's motion to set aside plaintiff's dismissal of the action was granted by Molyneaux, J. From the judgment of dismissal entered pursuant to the order for judgment, plaintiff appealed. Reversed.

A. O. Edwards, George T. Simpson & John F. Dahl and *Eugene S. Bibb*, for appellant.

Dille, Hoke, Krause & Faegre and *Cobb, Wheelwright & Benson*, for respondent.

PER CURIAM.

This is an appeal from a judgment entered upon an order vacating and setting aside an attempted dismissal of an action by plaintiff and ordering judgment in favor of the defendant for its costs and disbursements.

The action was brought to recover damages for personal injuries. The defendant appeared and answered. In his reply plaintiff demurred to paragraph 3 of defendant's answer, which set up a settlement under the Workmen's Compensation Act, upon the ground that the same did not state facts sufficient to constitute a defense, and further the reply put in issue other portions of the answer. Thereafter a hearing was had upon the demurrer and a decision filed overruling the same with leave to amend the reply, which plaintiff failed to do. Some two months later plaintiff filed with the clerk a writing dismissing the action without prejudice. Subsequently the court, upon the return of an order to show cause, set aside the attempted dismissal and ordered judgment in favor of the defendant for its costs and disbursements. Judgment was so entered from which this appeal was taken.

The regularity of the order overruling the demurrer is not questioned upon this appeal. It challenges only paragraph 3 of the answer. It is set forth in the reply, in effect, that the cause of action alleged in the complaint is not subject to and does not come under the Workmen's Compensation Act. The injury complained of is alleged to have resulted from the negligence of defendant's servants in operating an X-Ray machine in its hospital, some time subsequent to the injury sustained by plaintiff while performing his usual labor in the course of his employment by defendant about its factories. Whether the injury referred to in the complaint was subject to the act cannot well be determined until a trial is had. It is alleged by plaintiff that it was not subject to the act, while paragraph 4 of the answer alleges that it arose out of and in the course of plaintiff's employment and was subject to and limited by the provisions of the act. This allegation raises an issue of fact aside from the one raised by the paragraph demurred to, and, as we read the pleadings, was in issue at the time judgment was ordered in favor of the defendant. It follows that defendant was not entitled to judgment on the pleadings. Under this view of the case it

becomes immaterial whether the dismissal was regular, plaintiff having the right to apply to the court for leave to amend his pleadings.

Judgment reversed.

CLARENCE A. WEEKER AS ADMINISTRATOR OF THE ESTATE OF VERNON C. WEEKER, DECEASED v. DR. C. HAMEL AND DR. F. C. RODDA.[1]

November 10, 1921.

No. 22,472.

Physician and surgeon.

Action against physicians for their negligence in diagnosing ailment of young child and for operating on the child without the consent of the parents. At the close of plaintiff's testimony the court directed a verdict in favor of defendants. From an order denying a new trial, plaintiff appealed. Affirmed for entire failure of proof showing actionable negligence. [Reporter.]

Action in the district court for Hennepin county to recover $7,500 for the death of plaintiff's minor intestate. The case was tried before Molyneaux, J., who when plaintiff rested granted defendants' motion for a directed verdict on the ground that plaintiff had wholly failed to establish a cause of action. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Lewis Severance, for appellant.

Dille, Hoke, Krause & Faegre, for respondents.

PER CURIAM.

At the close of plaintiff's evidence, the court directed a verdict for defendants and plaintiff appealed from an order denying a new trial.

Plaintiff sought to recover damages for the death of his infant child on the ground that defendants, as physicians and surgeons, negligently failed to diagnose the ailment of the child correctly and treated it improperly. We are unable to find any evidence in the record tending to show that defendants' diagnosis was incorrect or their treatment improper. We also fail to find any error in the rulings of the court admitting or excluding evidence.

[1]Reported in 184 N. W. 1025.

Plaintiff urges that an operation was performed on the child without the consent of its parents. After one of defendants had treated the child for two or three weeks, at their suggestion, it was taken to a hospital by its parents where some sort of an operation seems to have been performed. The nature and extent of the operation do not appear, but apparently it consisted in opening an abscess in the neck or throat of the child. Neither does it appear who performed the operation, nor whether either of defendants were present or had anything to do with it. The action is brought under section 8175, G. S. 1913, which provides that "when death is caused by the wrongful act or omission of any person" the personal representative of the decedent may maintain an action therefor. There is no evidence that this operation was not necessary and proper treatment and properly performed, or that it had any part in causing the death of the child.

There is an utter absence of proof tending to show actionable negligence on the part of either defendant, and the order denying a new trial is affirmed.

JACOB ANDERSON v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY AND OTHERS.[1]

November 25, 1921.

No. 22,494.

Railway — liability of director general.

Sections 3795, 4426, G. S. 1913, are applicable to the director general of railroads. [Reporter.]

After the decision upon the former appeal, reported in 146 Minn. 430, 179 N. W. 45, judgment was entered upon the verdict. From that judgment, defendant railway company and Walker D. Hines appealed. Affirmed.

John L. Erdall, Fryberger, Fulton, Hoshour & Ziesmer and *H. B. Dike*, for appellants.

Clayton J. Dodge and *Hugh J. McClearn*, for respondent.

PER CURIAM.

Appeal from a judgment of the St. Louis district court.

This case was here before on the appeal of the defendants from an order denying their alternative motion for judgment notwithstanding the verdict or a new trial. The decision is reported in 146 Minn 430, 179 N. W.

[1]Reported in 185 N. W. 299.

45. On the going down of the mandate judgment was entered in the court below on November 29, 1920, upon the verdict theretofore rendered. This appeal is from that judgment.

After the appeal, as shown by the records of this court, the appeal of the defendant railroad company was dismissed. The only defendant now present upon this appeal is Walker D. Hines, director general of railroads.

The assignments of error include those made on the former hearing and certain additional ones. All have had our attention. We have considered the claim of the defendant, specifically made, that G. S. 1913, §§ 3795, 4426, relative to the operation of railroads, imposing in certain cases an absolute liability, are not applicable to the director general, and hold against his contention. This is in accord with our understanding of our prior decision. With this statement added, and following the former decision, the judgment is affirmed.

We may add that anything that occurred in the court below after the judgment relative to a substitution of the agent of the president is not before us on this appeal.

Judgment affirmed.

JOHN KAHLOW v. HENRY MALZ.[1]

November 25, 1921.

No. 22,563.

Boundary — conflicting evidence.

The finding of the trial court, upon conflicting evidence, sustained on appeal. [Reporter.]

Action in the district court for Le Sueur county to recover possession of a strip of land and $100. The answer set up the statute of limitations. The case was tried before Tifft, J., who made findings and ordered judgment in favor of defendant dismissing the action. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

F. C. & H. A. Irwin, for appellant.

Thomas Hessian, for respondent.

PER CURIAM.

Action to determine the ownership of a strip of land 12 feet wide extend-

[1]Reported in 185 N. W. 299.

ing along the boundary line between the farms of the respective parties; one in effect to determine the boundary line. The cause was tried before the court without a jury and the court found the disputed strip belonged to defendant and was a part and parcel of his land. The only question presented on the appeal, one from an order denying a new trial, is whether the findings are sustained by the evidence. Our examination of the record leads to an affirmative answer. The evidence is conflicting, presenting an issue of fact for the trial court. We discover no sufficient reasons for interference.

Order affirmed.

STATE v. A. L. LYCKHOLM.[1]

November 25, 1921.

No. 22,764.

Certified case.

It is an essential prerequisite to a certificate of court in a criminal case that the question presented has been decided by the trial court, where the question does not arise upon a demurrer or special plea to the indictment or a motion relating thereto. [Reporter.]

Case certified from the district court for Goodhue county, Johnson, J.

C. S. Hilton, Attorney General, and *Arthur E. Arnston*, County Attorney, for the state.

Frank M. Wilson, for defendant.

PER CURIAM.

This cause is presented by the certificate of the court below for the opinion of this court upon the sufficiency of the indictment against the defendant accusing him of a public offense. It appears from the certificate that the defendant entered a plea of not guilty, that a jury was impaneled for the trial of the issues presented by the indictment and the defendant's plea, and a witness for the prosecution had been called and sworn when counsel for the defendant interposed an objection to the introduction of any evidence in the case, on the ground that the indictment does not set forth facts sufficient to constitute a public offense. The court being in doubt, the county attorney and counsel for the defendant united in a request that the question be certified to this court and it is certified accordingly.

[1]Reported in 185 N. W. 291.

The certificate must be dismissed. The question presented does not arise upon a demurrer or special plea to the indictment, nor has there been a conviction thereunder. Neither has the trial court decided the question presented by defendant's motion, and this is an essential prerequisite. State v. Wellman, 143 Minn. 488, 173 N. W. 574.

The proceedings in this court are dismissed and the cause remanded for further proceedings in the court below.

FERDINAND A. SHILHA v. LOUIS O. COTE AND ANOTHER.[1]

December 2, 1921.

No. 22,522.

Appeal and error — decision sustained.

Action for specific performance of land contract. Finding of trial court that $1,300 was due and decree of performance upon payment of that sum *held* amply supported by the evidence. [Reporter.]

Action in the district court for Pine county for the specific performance of a land contract. The case was tried before Searles, J., who made findings and ordered judgment that plaintiff was entitled to a conveyance of the land from defendants upon his paying them the sum of $1,431.68. From an order denying his motion for amended findings, plaintiff appealed. Affirmed.

Ottocar Sobotka, for appellant.

P. S. Olson, for respondents.

PER CURIAM.

Action for specific performance of an executory contract for the sale of land. The action was by the assignee of the vendee and the only question involved, as the case comes to this court, is the amount due on the purchase price of the land. The court found that $1,300 was due and unpaid. Plaintiff challenges the finding as not sustained by the evidence, insisting that the record is conclusive that $1,200 only was due on the contract. Our examination of the record discloses ample evidence to sustain the findings. The original purchase price of the land was $1,300, and the vendee testified that no part thereof was ever paid by him, and his assignee, plaintiff, does not claim to have paid any thereof at any time. The receipt, Exhibit B, relied upon by plaintiff as an acknowledgment of payment, cannot be

[1]Reported in 185 N. W. 399.

given that effect, at least it is not conclusive that the disputed $100 had been paid on the contract.

Order affirmed.

FARMERS CO-OPERATIVE EQUITY COMPANY v. JOHN BARTON PAYNE, AS AGENT DESIGNATED BY THE PRESIDENT, UNDER TRANSPORTATION ACT OF 1920.[1]

December 16, 1921.

No. 22,361.

Service of process on foreign carrier — cases followed.

Action in the municipal court of Minneapolis to recover $30.90 for loss of grain while in transit. Defendant appeared specially and prayed that the service of the summons be vacated. This application was denied. The case was tried before C. L. Smith, J., who overruled defendant's objection to the introduction of any testimony on the ground that defendant was not properly in court, made findings and ordered judgment in favor of plaintiff. Defendant's motion to set aside the findings and conclusions and dismiss the action, was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Faricy, McMeekin, Quinn & Swan, Gardiner Lathrop and *Homer W. Davis*, for appellant.

Alex Kanter, for respondent.

PER CURIAM.

The defendant appeals from a judgment rendered by the municipal court of the city of Minneapolis for the loss, while in transit, of a quantity of grain shipped from Isabel, Kansas, to Hutchinson, Kansas, over the Atchison, Topeka and Santa Fe Railway while under Federal control. The railway company neither owns nor operates any line of railway in this state, but maintains, in this state, an agent for the solicitation of freight and passenger traffic over its lines outside of this state. It does no business in this state except to maintain such resident agent and solicit such traffic. The summons and complaint were served on this agent under and pursuant to section 7735 of the General Statutes of 1913, which provides:

[1]Reported in 186 N. W. 130.

"That any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent."

The defendant rests his appeal on the contention that, insofar as the statute provides that service on a soliciting freight or passenger agent shall confer jurisdiction over a foreign railway company which does no business in this state, except to solicit freight and passenger traffic therein for its lines outside of the state, the statute contravenes the Federal Constitution and is void. This question has already been determined adversely to defendant by this court in the following cases: W. J. Armstrong Co. v. New York C. & H. R. R. Co. 129 Minn. 104, 151 N. W. 917, L.R.A. 1916E, 232, Ann. Cas. 1916E, 335; Lagergren v. Pennsylvania R. Co. 130 Minn. 35, 152 N. W. 1102; Rishmiller v. Denver & R. G. Ry. Co. 134 Minn. 261, 159 N. W. 272; Merchant's Elev. Co. v. Chesapeake & O. Ry. Co. 147 Minn. 188, 179 N. W. 734; and Callaghan v. U. P. R. Co. 148 Minn. 482, 182 N. W. 1004. We recognize that the final decision of this question rests with the Supreme Court of the United States, but, as we read its decisions, that court has not yet determined the question, and, until it does, we feel constrained to follow our previous rulings.

Judgment affirmed.

ANGUS P. PRAUGHT, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ARMELLA PRAUGHT, DECEASED v. GREAT NORTHERN RAILWAY COMPANY.

ANGUS P. PRAUGHT, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF BERTHA D. PRAUGHT, DECEASED v. GREAT NORTHERN RAILWAY COMPANY.[1]

December 16, 1921.

Nos. 22,542, 22,543.

Damages not excessive.

The verdict negativing contributory negligence was sustained by the evidence, and the damages are not so out of proportion to the loss suffered by plaintiff as to justify interference by the court. [Reporter.]

After the former appeal reported in 144 Minn. 309, 175 N. W. 998, the case

[1]Reported in 185 N. W. 965.

was tried before Giddings, J., and a jury which returned verdicts for $3,000 and $1,500 respectively. Defendant's motion for judgment notwithstanding the verdict or for a new trial, was denied. From the order denying its motion for a new trial, defendant appealed. Affirmed.

Dille, Hoke, Krause & Faegre, for appellant.

Henry Spindler and *F. E. Latham*, for respondent.

PER CURIAM.

These actions were before the court on a former appeal, 144 Minn. 309, 175 N. W. 998. There was a reversal for error in the instructions of the court. A second trial resulted in a verdict for plaintiff in each case. They are now before us on appeal from an order denying a new trial. The only questions presented are: (1) Whether there was error in the charge of the court on the question of contributory negligence; and (2) whether the verdicts are excessive. When the cause was here on the former appeal a majority of the court doubted the sufficiency of the evidence to justify the submission of the question of contributory negligence to the jury. However, the cause was remanded for retrial of that issue and it was so submitted. The evidence on this appeal is substantially the same as found in the former record. Further consideration of the question leads to the conclusion that the verdict negativing contributory negligence is fully supported by the evidence. We further hold that there was no error in the charge of the trial court on that subject, conceding that there was evidence to go to the jury on the question. Lewis v. Chicago, St. P. M. & O. Ry. Co. 111 Minn. 509, 127 N. W. 180.

The damages seem large, but are not so out of proportion to the loss suffered by plaintiff as to justify interference by this court.

Order affirmed.

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—In re Petition of Johnson, 524.

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CONTRACT.

Offer and Acceptance. See Broker, 1.

Of Indemnity.

1. Unequivocal language requires no construction of court—Words of indemnity against claims on contracts may include subsequent breaches arising from previous contracts—Indemnitor liable for reasonable expense of making defense to claim when he is bound to defend and refuses tender of defense.
—Northern Welding Co. v. Jordan, 12.

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Rescission. See Cancelation of Instrument.

2. Banker in North Dakota asked plaintiff bank for loan of $45,000 to enable rancher to make payment on price of 500 Texas steers for fattening, recommending loan as good and borrower as good man. Good man was insolvent and the banker was partner of the rancher. Loan was made. Chattel mortgage on nonexistent cattle sent to plaintiff as security. Other false representations made. Evidence warranted a directed verdict in favor of plaintiff.
—First National Bank of St. Paul v. Blocker, 339.

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3. Damages for unearned commissions for collecting rents from defendant's apartment building are not uncertain nor remote, but they are to be reduced by necessary expenses.
—Yeates v. Young, 274.

CORPORATION.

Promoters' Relation to Stockholders.

1. Exchange of stock for stock in new corporation—Promoters of latter stand in fiduciary relation to all stockholders and could not without consideration issue stock for their personal benefit.
—American Barley Co. v. McCourtie, 460.

2. Action by volunteer stockholder against trustees for restoration of profits wrongfully appropriated by them, after refusal of corporation to bring it, is in legal effect a suit by the corporation—But in case of failure company cannot be bound to pay expense of suit.
—Eriksson v. Boyum, 192.

3. Service of process under G. S. 1913, § 7735—Managing agent defined—General agent of railroad in another county not ticket nor freight agent.
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4. Change of rates of mutual benefit association a matter of internal management—Suit to enjoin will not be entertained—Demurrer to complaint should have been sustained.
—Olsen v. Danish Brotherhood in America, 8.

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1. May terminate guardianship of State Board of Control over neglected

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child when the mother proves she is able and willing to support and educate child—Legal adoption takes the child out of the control of the court.

—State ex rel. v. Probate Court of Mahnomen County, 16.

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2. Action for breach of contract and recovery of expenditures made for defendant in managing her apartment building—Answer set up no counterclaim nor facts requiring equitable relief—Municipal court had full jurisdiction.

—Yeates v. Young, 274.

CRIMINAL LAW. See Indictment; License, 2.

1. Character of defendant cannot be attacked unless put in issue by defendant.

—City of St. Paul v. Harris, 170.

2. The general rule is that character evidence should be confined in point of time to a period antedating the accusation—Right of defendant to introduce character evidence of moral qualities—When sufficient.

—State v. Dolliver, 155, 158.

3. Facts should be determined by the jury, uninfluenced by the judge's opinion.

—State v. Dolliver, 155, 158.

4. Error to charge jury that defendant's good reputation alone is not sufficient to raise reasonable doubt of his guilt.

—State v. Dolliver, 155, 158.

5. Where any one of several errors assigned would not in itself be sufficient ground for the reversal of a conviction in a criminal case, yet, if all of them taken together justify the conclusion that defendant was not accorded a fair trial, he is entitled to a new trial.

—State v. Dolliver, 155, 157.

Certified Case.

6. Prior decision of trial court requisite for certifying case to supreme court, unless question arises upon demurrer or special plea to the indictment or conviction thereunder.

—State v. Lyckholm, 532.

Homicide.

7. Submission of murder in the first degree to the jury justified by the evidence—Act of prosecuting attorney not objectionable because of race prejudice—Conviction sustained.

—State v. Wormack, 249.

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8. Consent of person under age of consent immaterial—How inference from pregnancy may be refuted—Fact of illicit relations with other men no defense—Offer of such evidence too indefinite—Evidence of such acts with defendant before and after time specified in indictment admissible where not too remote—Allegation of indictment negtives any marital relation—Verdict sustained.
—State v. McPadden, 62.

Receiving Stolen Property.

9. Accused's letter to sellers of stolen automobile tires, offering to take all the tires they could offer, admissible to show guilty knowledge—Accused's statement, after arrest, with reference to number of tires and the prices at which he had bought, admissible—Letter admissible because of writer's cross-examination.
—State v. Brodt, 432.

DAMAGES. See Municipal Corporation, 13; Sheriff and Constable.

1. Test for deciding whether party indemnified should violate its contracts with agents in order to mitigate damages.
—Northern Welding Co. v. Jordan, 12.
2. Defendants' automobile struck plaintiff when between a car at rest and the curb. Held: A verdict for $400 did not indicate passion or prejudice of the jury.
—Moen v. Olson, 484.
3. Verdict for $3,000 for personal injuries not excessive.
—Praught v. Great Northern Railway Co. 535.

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—Midland Trust & Savings Bank v. Nagle, 279.

DESCENT AND DISTRIBUTION.

Sale of land in good faith to one heir at appraised valuation not constructive fraud on heir not knowing of agreement among heirs that such purchase could be made—Co-tenant may purchase the interest of another co-tenant—Exclusion of evidence of value of improvements proper.

—Ziebarth v. Donaldson, 308.

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DISORDERLY HOUSE. See Criminal Law, 1.

DIVORCE.

1. No ground for absolute divorce—Separation should not be limited in time—Allowance for maintenance increased from $50 to $100 per month and that for attorney's fees made $300, with allowance of $200 for attorney's fees in connection with the appeal and $400 for necessary expenses in connection with the appeal.

—Gilman v. Gilman, 271.

2. Decree required defendant to pay $1,500 for her husband's interest in certain real estate—No error in receiving judgment roll in husband's action to collect the money and in court canceling the wife's privilege upon failure to pay.

—Lee v. Lee, 526.

Custody of Child.

3. Decree of divorce amended as to custody of children. Appeal from judgment by father, with supersedeas bond. Mother sued out writ of habeas corpus. Held: Correct to give mother temporary custody in accordance with terms of amended decree.

—State ex rel. v. Spratt, 5, 7.

DRAIN.

1. Petition filed before action taken by county board is in time—Mailing of notice of hearing before publication valid—Failure to mail notice to landowners may be waived—Order establishing ditch prima facie evidence of regularity—Surety of contractor estopped from asserting contract was void.

—County of Le Sueur v. Globe Indemnity Co. 120, 123.

2. On appeal to district court to fix benefits trial is de novo—Finding of the viewers is not evidence—Viewer is a competent witness, but his testimony may be attacked—Scope of his cross-examination

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discretionary with court—Comparative values of different tracts.
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3. County auditor has no authority to grant extension of time for completion of ditch contract.
—Haney v. Ferch, 327.

4. Action by contractor against subcontractor for breach of contract and bond—Plaintiff entitled to reasonable cost of completing what defendants left uncompleted—County not necessary party after completion of ditch and acceptance—Exclusion of unexecuted contract not error—Measure of damages—Verdict sustained.
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ELECTRICITY.

Injury to minor from coming in contact with high power electric wires on or near outside stairway to switch house—Negligence of the parties question for the jury—Error to direct verdict.
—Davidson v. Otter Tail Power Co. 446.

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EVIDENCE.

Judicial Notice.

1. Court may well take notice of the general practice in the mining regions of Minnesota for villages to extend their limits so as to take in every suspected body of ore irrespective of fitness for business or residence purposes.
—Reed v. Village of Hibbing, 141.

2. Courts will not take notice of Minimum Wage Commission's orders.
—State v. Allyn, 123.

Burden of Proof. See Bills and Notes, 1, 2; Will, 1.

Books of Account.

3. Court justified in thinking order for production of defendant's books was asked in order to enable the state to fish for evidence, and in refusing order for that reason.
—State v. Minneapolis Cold Storage Co. 208.

4. In tax enforcement case court has power to compel party to produce his books and papers, if they contain evidence material to the

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issues—Opposite party may not use information gained from them as basis for taxing property of third persons.

—State v. Minneapolis Cold Storage Co. 208, 211.

Parol Evidence to Vary Writing. See Frauds (Statute of), 1.

5. Parol evidence admissible to show that a contract in form of a promissory note and delivered to the payee was intended to take effect only on the failure of the maker to perform all the conditions of the agreement.

—Drovers Cattle, Loan & Investment Co. v. McGraw, 50.

Opinion of Medical Expert. See Intoxicating Liquor, 2.

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EXECUTOR AND ADMINISTRATOR.

Administrator's contract for private sale not binding until confirmed by probate court—Where confirmation is revoked for default of buyer, his wife acquires no marital interest in land—His wife acquires no interest when husband procures conveyance to another —No collateral attack on probate records nor for irregularity of procedure on amending order.

—Amundson v. Hanson, 287.

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FRAUD. See Assignment, 1.

1. False representations made deceitfully by third person to prospective purchaser of land may be actionable.

—Batchelder v. Stephenson, 215.

2. Waived by making new agreement after discovery of fraud—Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737.

—Moe v. Shaffer, 114, 117.

FRAUDS (STATUTE OF).

1. After contract of sale has been performed as modified by parol, it is not within the statute, and parol evidence of the consideration for modification is admissible—Decision supported by evidence.

—Durdahl v. Tostenson, 415, 416.

2. Parol promise to pay debt of another, for which promisee is secondarily liable, on agreement of promisee to repay, is not within the statute.

—Timm v. Aiton, 450.

GARNISHMENT. See Appeal and Error, 2; Venue, 2.

1. Lien not subject to rights of holder of unaccepted bill of exchange drawn on garnishee—No implied acceptance of bill by sale of cattle where drawee was garnished before receipt of notice of bill.
—Live Stock State Bank v. Hise, 301.
2. Holder of garnishee's note properly made a party—Plaintiff obtained inchoate lien by garnishment with right to question validity of note.
—Security State Bank of Waldorf v. Brecht, 502.
3. Trial of issues made upon disclosure upon evidence as in ordinary litigated actions—Insolvency of garnishee shown by receiver in bankruptcy.
—Parke, Davis & Co. v. Mewhirter, 234.

GUARANTY.

Guaranty "against loss" is one against loss from failure to collect, and the creditor must exhaust remedy against principal before calling on guarantor—Guaranty executed in summer of 1916 and goods paid for—Question for jury whether guaranty covered purchase made in February, 1918—When agreement to accept guaranty precedes execution, no further notice to guarantor necessary.
—Wyman, Partridge & Co. v. Bible, 27, 29.

HABEAS CORPUS. See Divorce, 3; Sheriff and Constable.

1. Proceedings under a writ cannot be suspended by a stay of proceedings in another action, even when rights of the parties may depend upon the result of the other action.
—State ex rel. v. Spratt, 5.
2. Custody of boy awarded to grandmother instead of father.
—State ex rel. v. Emrick, 474.

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1. Growing tree dangerous to travelers—No legal duty on abutting owner to safeguard travelers—Not changed by notice from town board to remove trees—Risk from falling tree must be assumed by travelers.
—Zacharias v. Nesbitt, 369.
2. Head-on collision between plaintiff's team of horses and defendant's motor on dark night—Following traveled track on left side of public road not negligence—Duty of drivers of approaching vehicles—Exclusion of evidence of finding broken glass on road the next day proper, because it would not change the verdict—No departure from pleaded issues because of dispute as to the precise

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place and manner of accident—Affidavits of jurors to impeach verdict not admissible.

—Keane v. Butner, 90, 92.

3. Collision after dark between motor and horse-drawn vehicle—Plaintiff saw the machine's lights but kept the center of the road—He cannot recover—Negligence of both drivers—No new trial for newly discovered evidence.

—Brutscher v. Jacobson, 444.

HOMESTEAD. See Public Land, 1, 2; Reformation of Instrument, 1.

1. False representation that mortgagor was unmarried—After death of his wife husband estopped against asserting invalidity of his mortgage because wife did not join.

—Bozich v. First State Bank of Buhl, 241.

2. Homestead right of wife waived by her joinder in deed of it.

—Lussnig v. Investors Security Assn. 491.

HOMICIDE. See Criminal Law, 7.

HUSBAND AND WIFE. See Executor and Administrator.

Antenuptial contract set aside—Prospective wife, without means, surrendered all marital property rights and received nothing in return. **Held:** The entire absence of provision for the wife imposed upon the husband the burden of showing that there was no fraud or concealment and that she knew the value of his property and her rights as wife and widow.

—Welsh v. Welsh, 23.

INJUNCTION. See Corporation, 4; Municipal Corporation, 8, 9, 18; School and School District, 3, 4; Street Railway, 1.

Statutory notice to terminate contract of sale upon default—Vendee not entitled to temporary injunction after service of notice.

—Nolan v. Greeley, 441.

INSURRECTION AND SEDITION.

1. Criminal Syndicalism Act of 1917 not so indefinite as to be unconstutional—Statute applies to corporations—Accused entitled to know of what he is accused—Indictment under the act sufficiently specific—Newspaper article held a violation of the act—Intent to advocate not an element of offense—Managing editor may be criminally responsible for unlawful publication.

—State v. Workers' Socialist Publishing Co. 406.

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2. What constitutes a newspaper "manager" within G. S. 1913, § 8648—Business or circulation manager must have notice to be criminally liable under Criminal Syndicalism Act of 1917.
—State v. Workers' Socialist Publishing Co. 406.

INSURANCE.

Accident.

1. Construction of policy—Accident insurance broad expression—Parties might agree to exclude defense of suicide—Printer's error in using "including" for "excluding" not mutual mistake—Question of unlawful occupation submitted to jury.
—Seiler v. Commercial Accident Insurance Co. 353.

2. Stricture of the urethra—Laceration from metal catheter—Death by accident sustained by evidence—Evidence of pre-existent disease not conclusive—Meaning of "immediate notice" of death to insurer—Notice of death excused.
—Frommelt v. Travelers Insurance Co. 66.

Health and Accident.

3. Waiver of notice of illness—Effect of waiver of notice under G. S. 1913, § 3524 (c)—Letters of president of insurer admissible to show waiver—False answer in application—Knowledge of agent imputed to insurer—Boarding-house keeper—Construction of policy.
—Kearns v. North American Life & Casualty Co. 486.

4. Construction of policy—Origin of disease.
—Cohen v. North American Life & Casualty Co. 507.

Life.

5. As to insured's creditors his rights are subordinate to those of his beneficiary—Creditor cannot attack insured's right of option to demand cash value of policy nor insured's contingent interest in case he outlives beneficiary—G. S. 1913, § 3465.
—Murphy v. Casey, 107.

INTOXICATING LIQUOR.

1. Penalty for illegal transportation is destruction of liquor, forfeiture of the vehicle used in transportation, fine and imprisonment—Laws 1919, c. 455; Laws 1921, c. 335, as amended by Laws 1921, c. 391.
—State ex rel. v. Brown, 293.

2. Death of husband caused by illegal sale of liquor—Opinion of medical expert—Refusal to strike inaccurate hypothetical question and answer—Authenticated copy of death record—Bank book admissible as to financial condition—New trial for improper inclusion of damages before death—Recovery against surety for illegal sales—Erroneous charge.
—Pete v. Lampi, 423.

JUDGMENT. See Taxation, 1.

1. Prevailing party entitled to judgment consistent with issues litigated, not on prayer for relief—Grant of relief beyond that demanded not void if within the pleadings or litigated by consent—Otherwise in default judgments where statutory limitation.
—Jackson v. Straabe, 329.

2. Action in ejectment—Admission of plaintiff's title by lack of denial in answer—Judgment determining title consistent with the pleadings.
—Jackson v. Straabe, 330.

Res Judicata. See Workmen's Compensation Act, 6.

3. Not vacated by an appeal with a supersedeas bond—Matters determinded by it remain res judicata until it is reversed.
—State ex rel. v. Spratt, 5, 7.

4. Judgment of dismissal, rendered pursuant to an order of court and upon findings of fact negativing all of defendant's claims on their merits, is a final adjudication of the issues presented and therefore a bar to this action.
—Windelin v. Kirchhof, 413.

On Warrant of Attorney.

5. Valid when entered on warrant of attorney authorizing it without process—Defenses to action upon judgment of court of record of sister state; presumed that attorney's fees included in judgment are proper.
—Moe v. Shaffer, 114.

JUDGMENT NOTWITHSTANDING VERDICT. See Appeal and Error, 3, 9; Log and Logging; Municipal Corporation, 15; Nuisance.

1. Not warranted in favor of defendant where trial court thinks sufficient evidence to justify verdict for plaintiff can be supplied on second trial—Court exercises judicial discretion in deciding probability of existence of such evidence.
—Scanlon v. Wanless, 83.

2. Where an issue becomes a jury question, a motion for judgment notwithstanding the verdict should be denied, as was done by the court.
—Siverts v. Dahoot, 180.

3. Where two defendants, after verdict, jointly move for judgment, their cases must stand or fall together.
—Martinson v. Neubert, 265, 266.

JURY.

Right to jury trial in action for merchandise sold—Conciliation Court Act valid—Right of removal to municipal court satisfies Constitution's guaranty of such trial—Requirement of bond to pay judgment invalid—Requirement as to jury fee valid.

—Flour City Fuel & Transfer Co. v. Young, 452.

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LANDLORD AND TENANT. See Poison; Trover and Conversion, 3.

Explosion of steam boiler—Res ipsa loquitur applies to tenant but not to insurance casualty company—Application of doctrine not affected by specific allegations of negligence of tenant—Absence of fusible plug—Not error to refuse to submit question to jury—Action of landlord to recover damages.

—Kleinman v. Banner Laundry Co. 515.

LIBEL AND SLANDER.

When Charge against Third Person Admissible to Show Malice.

Evidence of slander against third person admissible to show malice, where it implies crime by third person and plaintiff.

—Linnehan v. Sheeran, 171.

LICENSE.

Exhibition of Motion Pictures.

1. Public exhibition of motion pictures may be licensed by state and municipal corporations as an exercise of police power, but by ordinance village councils may prohibit them on Sunday—G. S. 1913, §§ 1268, 1269—Such ordinance is not a Sunday regulation but one of business, not in conflict with the state law or policy.

—Power v. Nordstrom, 228.

Sale of Investment Securities.

2. Sale of investment securities without license—Where indictment shows on its face that defendants were owners of securities sold, necessary to allege and prove that sale was in course of successive transactions of similar nature—When not owners, sufficient facts must be pleaded to show defendants were dealers—Units, as defined in indictment, within terms of Blue Sky Law.

—State v. Summerland, 266.

LIMITATION OF ACTION. See Workmen's Compensation Act, 2.

1. Complaint fatally defective which fails to show facts avoiding the operation of statute which the complaint shows had run before action was begun.

—Chicago, Burlington & Quincy Railroad Co. v. Benson Produce Co. 78.

LIMITATION OF ACTION—Continued.

2. When action arising in another state is barred, action in Minnesota is barred—Defendant's absence from the state must be set up in reply.
—Moe v. Shaffer, 115.

LOG AND LOGGING.

Action against defendant manufacturing company for wrongful use of dams and waters of Mississippi river by its servants while driving its logs from Lake Itasca to Lake Irving. Held: The written contract under which the logs were driven showed that the log drivers were independent contractors and were not under the control of defendant. Defendant's motion for judgment non obstante should have been granted.
—Wallace v. Pine Tree Manufacturing Co. 386.

MALICE. See Landlord and Tenant; Libel and Slander.

MANDAMUS. See Venue, 1.

1. Used to review orders granting or denying motion for change of venue, either as matter of right or because of convenience of witnesses.
—State ex rel. Security State Bank of Waldorf v. District Court of Waseca County, 498.
2. Review of order changing venue—Order sustained by affidavits presented.
—State ex rel. Winnegar v. District Court of Waseca County, 496.

MASTER AND SERVANT.

Minimum Wage Commission.

1. Employer not affected by order fixing minimum wage of women and minors until copy of order has been mailed to him—To make orders admissible in evidence compliance with the provisions of section 6 must be shown.
—State v. Allyn, 123.
2. Not authorized by statute to define who are persons of ordinary ability; that question for the courts.
—State v. Allyn, 123, 126.

Liability of Master to Third Persons.

3. Plaintiff's intestate was run over and killed by the automobile of defendant company when defendant Staninger who was in its service, was using it in advertising and selling its goods. Held: The evidence warranted a finding that Staninger was in defendant's employ and engaged in its business at the time, though direct evidence

MASTER AND SERVANT—Continued.

was wanting. The trial court therefore erred when it dismissed the action when plaintiff rested.

—Fransen v. Kellogg Toasted Corn Flake Co. 54.

Injury to Servant.

4. Death of foreman of switching crew in railroad yard—Use of switchyard with width of clearance between tracks common 20 years ago—Low joints in track causing swaying of cars—To recover plaintiff must show injury was caused by negligence charged—Circumstantial evidence insufficient to warrant inference that accident occurred from negligence charged.

—McNamee v. Hines, 97, 98.

5. Cook employed by defendant for crew of track men within his line of duty while going to nearby town for supplies—Finding sustained that operator of derailed track motor car was negligent and plaintiff free from negligence.

—Paras v. Chicago Great Western Railroad Co. 244.

6. Truck owner, hauling and delivering coal for fuel dealer at stipulated rate per ton, agent and servant of latter, not an independent contractor—Waters v. Pioneer Fuel Co. 52 Minn. 474, 55 N. W. 52, followed.

—Dunn v. The Reeves Coal Yards Co., Inc. 282.

7. Plaintiff, aged 20, while riding head car of string of cars to set the brakes, was thrown off by violent and unusual jerk caused by engineer's negligence—Charge to jury on effect of contributory negligence under Federal Employer's Liability Act inaccurate but unduly favorable to defendant—Verdict reduced to $45,000.

—Carlson v. Payne, 480.

8. What constitutes assumption of risk by servant—Insufficient clearance between tracks in switchyard—Brakeman riding on tender—When servant is negligent as matter of law in selecting dangerous way in which to do his work—Evidence did not bring case within the rule.

—Outcelt v. Chicago, Burlington & Quincy Railroad Co. 398.

9. Master liable for torts of servant in furtherance of master's business—Assault by defendant's son upon hotel cook warranted exemplary damages against master, even though latter did not authorize or ratify son's acts—Verdict of $550 not excessive.

—Schmidt v. Minor, 236.

MATERNITY HOSPITAL. See Statute, 2.

MINE AND MINERAL. See Appeal and Error, 1; Evidence, 1.

MINIMUM WAGE COMMISSION. See Evidence, 2; Master and Servant, 1, 2.

MORTGAGE. See Broker, 1, 2; Homestead, 1.

To determine whether deed and contract of sale back to grantor in deed constituted a mortgage, the holder of the contract should be joined as a necessary party.

—Lewis v. Babcock, 394, 395.

MOTION PICTURE. See License, 1.

MULTIPLICITY OF SUITS. See Municipal Corporation, 9.

MUNICIPAL CORPORATION.

Annexation of Territory.

1. Quo warranto—What territory may be annexed under G. S. 1913, § 1800—Court will not sustain arbitrary action by voters—Annexation here was arbitrary and invalid.

—State ex rel. v. Village of Buhl, 203, 204.

2. City of Crookston—Authority to contract for supply of water to inhabitants—Not governmental function—Rules of private contract apply to municipality—Sp. Laws 1879, c. 12—Recovery of amounts paid on deficiency earnings of defendant.

—City of Crookston v. Crookston Waterworks, Power & Light Co. 347.

Ordinance. See License, 1.

3. There can be no conflict between a statute and an ordinance, where there is no statute covering the subject matter of the ordinance.

—Power v. Nordstrom, 232.

Assessment—Change in Charter.

4. The paving of a street in St. Paul was completed prior to November 27, 1920, when a preliminary assessment was reported to and approved by the city council. Subsequently the assessment was ratified by the council, certified to the district court and confirmed on March 24, 1921, all pursuant to the provisions of the city charter. Held: An amendment to the charter adopted November 2, 1920, effective 30 days thereafter, limiting assessments for paving to the cost of a strip of pavement 12 feet wide, did not invalidate this assessment.

—Pittsburgh Coal Co. v. City of St. Paul, 166.

Resolution.

5. Paving resolution of council signed by mayor before time permitted by charter is invalid—Not being returned to council within time limit, took effect as for failure of mayor to act—Premature approval

MUNICIPAL CORPORATION—Continued.

cannot be held a veto—Could not be invalidated by failure of city clerk to indorse on resolution time when it was returned by mayor —Laws 1895, p. 35, c. 8, § 62.

—Hamre v. City of Thief River Falls, 40, 43.

6. Order that city clerk give notice of hearing on paving resolution is neither an "ordinance, order or resolution," which under defendant's charter must be signed or approved by the mayor.

—Hamre v. City of Thief River Falls, 43.

Paving Street Intersections.

7. City of St. Paul—Section 235 of charter that council may pay cost of paving street intersections out of general fund, is not mandatory.

—Pittsburgh Coal Co. v. City of St. Paul, 167.

Enjoining Paving.

8. If approved plan of assessing cost is wrong, there is a remedy in the assessment proceeding—Condition of city treasury immaterial —Offer to prove work was undertaken when prices were the highest excluded.

—Hamre v. City of Thief River Falls, 40.

9. Representative action to restrain enforcement of illegal tax by city ordinance—Relief granted to avoid multiplicity of suits and not refused because part of tax held legal—Wheelage tax—1921 act construed—Act not invalidated by unconstitutional exemption from tax.

—Fairley v. City of Duluth, 374.

Vacation of Street. See Municipal Corporation, 19.

Right of Way.

10. Section 2552, subd. 2, G. S. 1917 Supp. giving right of way to vehicle on right of driver approaching intersection, applies when the other street does not cross the first street.

—Holman v. Ivins, 285.

11. Collision of automobiles—Driver at street intersection has right of way when no car to his right is in sight.

—Kunz v. Thorp Fire-Proof Door Co. 362.

12. Collision between automobiles—Plaintiff's violation of statute respecting right of way at intersection constitutes contributory negligence—Could have stopped but attempted to cross ahead of defendant's car—Defendant negligent in speeding.

—Anderson v. A. E. Jenney Motor Co. 358.

13. Late at night a car suddenly turned to the right to avoid striking decedent, who was crossing the street. Defendant, 40 feet behind the car, was driving 20 to 35 miles an hour. When first car swerved to right, defendant turned to left and ran over and killed decedent as

MUNICIPAL CORPORATION—Continued.

he was trying to rise from the pavement. Whether defendant was driving at excessive speed under the circumstances and failed to exercise due watchfulness, was a question for the jury. Held: Verdict for $4,000 not excessive. Decedent was farm laborer 46 years old, earning $36 a month, board and room.

—Moore v. P. J. Downes Co. 336.

14. Whether the driver of defendant's truck was negligent in driving forward and striking the automobile in which plaintiff's daughter was riding, was for the jury, and its verdict for $4,000 in favor of plaintiff was sustained by the evidence.

—Butkeviz v. Crown Iron Works, 212.

15. Minneapolis demonstrator of automobile, while driving in St, Paul late at night to get cigarettes, ran over and killed plaintiff's intestate. Verdict against him sustained, but judgment notwithstanding verdict in favor of his employer.

—Moore v. P. J. Downes Co. 333.

16. City not liable for injury to child by nail in heavy plank taken from defective culvert over gutter and laid at the bottom of a ditch at the side of the street.

—Spiering v. City of Hutchinson, 305.

Sale of Property.

17. A village may dispose of its property when occasion arises unless it was acquired through a grant which forbids a sale.

—Reed v. Village of Hibbing, 131.

18. No unlawful conspiracy between defendants to vacate streets, change the route of an electric railway, lawfully dispose of village property and remove the business and residence sections of defendant village to a new location in order that the company owning the ore deposit under the present location may mine it—Nuisance—Taxpayers not entitled to injunction—No violation of Fourteenth Amendment.

—Reed v. Village of Hibbing, 130.

19. Objection that removal will increase taxes must be compared with the employment and revenue, public and private, to be derived from mining the town site—Vacation of streets cannot be forced into this suit.

—Reed v. Village of Hibbing, 130.

20. Unfair competition of mining company to remove the location of village—Court will not retain jurisdiction to award possible damages—Amendment of complaint.

—Reed v. Village of Hibbing, 131.

NAVIGABLE WATER. See Log and Logging.

NEGLIGENCE. See Automobile.
Wilful. See Street Railway, 2.

NEGOTIABLE INSTRUMENT ACT. See Bills and Notes, 1.

NEWSPAPER. See Insurrection and Sedition, 1.

NEW TRIAL. See Appeal and Error, 11; Intoxicating Liquor, 2; Physician and Surgeon, 1.

1. Failure to instruct jury on particular point, in absence of request so to do, is not ground for new trial.
—Outcelt v. Chicago, Burlington & Quincy Railroad Co. 398.

Because of Newly Discovered Evidence.

2. Not granted because of insufficient showing that it could not have been obtained on the trial.
—Lucas v. Case, 46.

3. New trial denied.
—Eriksson v. Boyum, 193, 199.

NOTICE. See Partnership.

NUISANCE.
Failure to give notice to abate before suit does not entitle defendant to judgment notwithstanding verdict, when.
—Alleman v. Director General of Railroads, 160.

PARDON.
State Board of Parole may discharge prisoner on condition—If condition fails, discharge is inoperative—Section 9273, G. S. 1913, authorizing return of paroled prisoner without a hearing constitutional.
—State ex rel. v. Crepeau, 80.

PARENT AND CHILD. See Court, 1; Habeas Corpus, 2; Quieting Title.

PARTIES TO ACTION. See Drain, 4; Garnishment, 2; Mortgage.

PARTNERSHIP.
Authorized use of retiring partner's name, after dissolution—Person knowing it may extend credit to continuing partners in reliance on it, until notified that authority has been withdrawn—Retiring partner charged with notice of use.
—Farmers State Bank of Evansville v. Forsgren, 221.

PHYSICIAN AND SURGEON.

1. Action for malpractice—New trial granted because hypothetical question put to medical expert incorrectly stated facts respecting appellant's treatment and plaintiff's condition.
—Scanlon v. Wanless, 84.
2. Action for malpractice—Fracture of arm near wrist of 14-year old girl resulted in deformity of hand and part of arm—Verdict of $5,000 held sustained by evidence and not excessive—Charge does not permit recovery for any injury other than that due to negligence of defendants.
—Bonderson v. Hovde, 177.
3. Verdict directed for defendants because of entire failure of proof in action for causing death of child and for operating on him without consent of parents.
—Weeker v. Hamel, 529.

PLEADING.

Complaint. See Attorney and Client, 5; Sale, 1; Statute, 1.

1. Allegation of nonexistent statute may be stricken.
—Moe v. Shaffer, 115.

Answer. See Judgment, 2.

2. What is in issue on motion to strike out answer as sham.
—O'Donnell v. Lesselyoung, 318.

Amendment. See Municipal Corporation, 20.

Demurrer. See Corporation, 4.

3. When variance is disregarded or an amendment permitted to cure the defect.
—Timm v. Alton, 450.

Judgment upon Pleadings.

4. Defendant not entitled to judgment on pleadings when they raise an issue of fact whether an injury sustained by plaintiff from an X-ray machine came under the Workmen's Compensation Act.
—Blankenburg v. Minneapolis Steel & Machinery Co. 527.

POISON.

Injury to young child from oxalic acid left by workmen in kitchen—Negligence of landlord question for jury—Turntable cases inapplicable.
—Martinson v. Neubert, 263.

PRINCIPAL AND AGENT.

Finding sustained that plaintiffs were authorized to buy coal and incur expense in management of defendant's apartment building.
—Yeates v. Young, 274.

PRINCIPAL AND SURETY. See Appeal and Error, 8; Guaranty.

Action on Fidelity Bond.

Notice from plaintiff's attorney to defendant of defalcation by principal —Admissions of embezzlement evidence against surety—Verdict sustained.

—Farmers Co-Operative Exchange Co. v. United States Fidelity & Guaranty Co. 126.

PROCESS. See Corporation, 3.

Service of process on soliciting freight or passenger agent of foreign carrier sustained—Cases followed.

—Farmers Co-Operative Equity Co. v. Payne, 534.

PUBLIC LAND.

1. Reference of homestead entry to special agent for investigation not equivalent to a contest or protest until formal proceeding was instituted by United States.

—Everett v. Wallin, 148.

2. Homestead entryman, in spite of fraud perpetrated on United States, entitled to have patent issued to him after lapse of two years—Proviso in U. S. Comp. St. § 5113 (Act of March 3, 1891), governs—Equitable maxim of clean hands not applicable to case where both parties participate in the fraud.

—Everett v. Wallin, 148.

QUIETING TITLE.

Oral gift of land from defendant to his son—Advances by parent expended by son in improvements—Action by son's wife in possession to quiet title after son's death—Finding of possession sustained—Equitable lien for advances sustained under equitable maxim—Lien attached before land became a homestead.

—Lindell v. Lindell, 295.

QUO WARRANTO. See Municipal Corporation, 1.

RACE PREJUDICE. See Criminal Law, 7.

RAILROAD AND WAREHOUSE COMMISSION. See Railway, 1.

RAILWAY.

Right of Way. See Boundary, 2.

Abandonment of Line.

1. In absence of contract, railway has constitutional right to abandon its road if it can be operated only at a loss—Railroad and Warehouse Commission without power to authorize an abandonment on that ground.

—State v. Duluth & Northern Minnesota Railway Co. 30.

RAILWAY—Continued.

Accident at Crossing. See Automobile.

2. Death at village crossing on branch line running only 3 trains a day, where view of traveler was unobstructed—No peculiar hazard there which would warrant a finding of negligence from absence of gates, flagman or other warning device—Whether such hazards exist, is a question for the jury—Evidence insufficient to sustain finding that usual signals were not given, but indicated that train was run at unlawful speed—Train had right of way and trainmen had right to assume people in motor would avoid collision—Court should have so charged.
—Hollister v. Hines, 186.

Fire.

3. Evidence sustained finding of court that director general of railroads negligently allowed fire to escape from locomotive, by reason of which plaintiff's property was destroyed.
—Hall v. Davis, 35.

Director General. See Attorney and Client, 3.

4. Sections 3795 and 4426, G. S. 1913, apply to the director general of railroads.
—Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 530, 531.

5. The case should have been dismissed as to the railroad company and the director general, and only the government agent retained as defendant—Proper practice to reverse and remand with directions.
—Outcelt v. Chicago, Burlington & Quincy Railroad Co. 399.

RECORD. See Intoxicating Liquor, 2.

REFORMATION OF INSTRUMENT.

1. Reformation of description in contract of sale to cover homestead of defendants and specific performance ordered.
—Ziegenhagen v. Hartwig, 356.

2. Omission in contract of sale that vendors should stand loss of building before delivery of possession—Evidence that vendors thereafter increased the insurance on buildings admissible.
—Teig v. Linster, 111.

RELEASE.

Consideration. See Deed.

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SALE.

Warranty.

1. Complaint for breach of warranty of quality of building cement con-

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strued—Implied warranty under Uniform Sales Act (1917) not affected by consistent express warranty—Verdict for $2,621 not excessive—Damages recoverable for removal of main floor and parts of walls of factory and for rental value of factory during delay in completion.

—Kitowski v. Thompson Yards, Inc. 436.

2. Evidence sufficient to sustain finding that plaintiff sold certain chairs to defendant.

—K. B. A. Chair Co. Inc. v. Davis, 93.

SCHOOL AND SCHOOL DISTRICT.

Consolidation.

1. Number of signers to petition required by Laws 1917, c. 453, is jurisdictional.

—School District No. 135 of Hennepin County v. McConnell, 57, 58.

2. Right of appeal to the district court is statutory and Laws 1917, c. 453, relating to the consolidation of school districts does not give an appeal. The right of appeal given by Laws 1921, c. 441, amending the earlier act, is not retroactive, and does not affect an application for an injunction submitted 4 days before the enactment.

—School District No. 135 of Hennepin County v. McConnell, 57.

3. In the absence of statutory right of appeal or other remedy, persons aggrieved may enjoin making and filing an order setting forth the result of an election for consolidation of school districts where the election is invalid because of the number of petitioners.

—School District No. 135 of Hennepin County v. McConnell, 57.

4. Delay of taxpayers until after the vote on school consolidation was taken, is not fatal to maintenance of an action for injunction on the ground that the petition was signed by an insufficient number of freeholders.

—School District No. 135 of Hennepin County v. McConnell, 61.

Annexation of Territory.

5. Chapter 236, Laws 1919, held not an independent enactment on the subject matter thereof, but as supplementary to G. S. 1913, § 2677, and conferring the same right upon the school district as is there extended to the freeholders. So construed the act is not unconstitutional.

—State ex rel. v. County of Mower, 163.

6. Right of appeal from orders made under G. S. 1913, § 2677, and Laws 1919, c. 236—Certiorari not available.

—State ex rel. v. County of Mower, 163, 166.

SET-OFF AND COUNTERCLAIM.

1. Claims against the assignor acquired before notice of assignment may be set off against a chose in action assigned before maturity, when an assignee sues thereon—A past due promissory note of the assignor of one of defendants was provable as an offset.
   —Nordsell v. Neilsen, 224, 227.
2. Error to exclude proof that, under a separate oral contract made at the same time the contract sued on was signed, a certain amount was payable to defendants prior to notice of the assignment.
   —Nordsell v. Neilsen, 224.
3. Evidence sufficient to sustain a verdict that ice was lost through the negligence of plaintiffs, and that plaintiffs did not leave a platform and certain lumber at defendant's ice house, but evidence was insufficient to sustain a verdict for the conversion of certain ice tools or for a loss of ice through fault of plaintiffs.
   —Lucas v. Case, 45.

SHERIFF AND CONSTABLE.

Sheriff not liable in damages for premature delivery of extradited prisoner, pending appeal in habeas corpus writ—Liable only to statutory punishment for violation of duty, unless aggrieved party has been specially injured in person or property.
—Nemec v. Brown, 253.

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—Shilha v. Cote, 533.

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1. Of foreign state need not be pleaded in haec verba.
   —Moe v. Shaffer, 115.
2. The title of the act: "An Act defining and regulating maternity hospitals" is sufficient within Const. art, 4, § 27, and in the exercise of its police power the legislature may require maternity hospitals to be licensed.
   —State v. Women's and Children's Hospital Assn. 247, 248.

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—State ex rel. v. Duluth Street Railway Co. 364.

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—Stansberry v. Monitor Stove Co. 1.

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